# Like Cases Alike or Asylum Lottery?

## Inconsistency in Judicial Decision Making at the Swiss Federal Administrative Court

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by Judith Spirig

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on the recommendation of the doctoral committee:

Prof. Dr. Marco Steenbergen, UZH (main Supervisor)
Prof. Dr. Benjamin E. Lauderdale, LSE
Prof. Dr. David Soskice, LSE
Prof. Dr. Heiko Rauhut, UZH

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## Abstract

What determines if an asylum seeker's appeal of a negative asylum decision is granted? Do factors other than the merits of the appeal influence its outcome? Building on insights from the literature on judicial politics, group decision making and how immigration shapes citizens' attitudes, this dissertation draws attention to three extra-legal factors that matter in Swiss asylum appeal decision making.

The Swiss Federal Administrative Court, which decides all asylum appeals in Switzerland, exhibits several institutional features that allow for the causal identification of the impact of extra-legal factors on asylum appeal decisions. Chief among them is a case allocation system that quasi-randomly assigns judges to panels of decision makers.

In a nutshell, this dissertation provides evidence that the composition of panels matters for asylum appeal decisions (Paper 1), that three-judge panels are more likely to grant appeals than a single judge with the consent of a second (Paper 2) and that judges decide more restrictively when newspapers report more on asylum and refugee issues (Paper 3).

The first, co-authored study explores the influence of judges' individual preferences on appeal decisions and investigates how they play out in panels of judges. In the absence of information about judges' individual votes, we estimate both the best model to explain how judges aggregate their preferences into a joint panel decision and their individually preferred grant rates. We find that three-judge panels make decisions according to a mix of chair-as-dictator and simple majority vote model and that judges' individual preferences matter, regardless of the aggregation rule we use. Making use of the fact that Swiss asylum judges are commonly political party members, we show that judges' preferred grant rates

and party affiliation correlate in expected ways: judges from left-wing parties are on average more likely to grant appeals than judges from right-wing parties.

The second study exploits an institutional change implemented in January 2008. While in 2007 all substantively tried asylum appeals were decided by three-judge panels, the introduction of a 'simplified procedure' in January 2008 has since entitled chair judges to decide appeals they consider 'clearly with or without merit' in an expedited procedure, with the consent of a second judge. A fuzzy regression discontinuity design approach reveals that the introduction of the new procedure led to a decrease in the grant rate for the cases it affected. In particular, this concerns appeals lodged by Nigerian asylum seekers, of dismissive asylum application decisions, and those handled by judges affiliated with center-right parties.

The third paper examines the impact of the frequently high political salience of asylum and refugee issues. Drawing on a large corpus of newspaper articles that report on asylum and refugee issues, this paper shows that, like ordinary citizens, judges are impacted by the salience of asylum issues. Despite—or perhaps due to—the high political salience of asylum issues, party affiliation is not found to condition the effect of media coverage: judges of all parties become more restrictive in times of high asylum issue salience.

Taken together, the three studies provide evidence that asylum appeal decisions are influenced by several factors that go beyond the legal merits of each case: the judges who decide them, the structure of the decision-making process that drives preference aggregation, the number of judges on the panel and the public salience of the broader political context of judges' work. Beyond raising serious concerns about the procedural fairness, the documented disparities also call into question the consistency of decision making.

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To those who care

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# Preface

This dissertation has two main parts: the first part, the synopsis, provides a comparative perspective on the case of the Swiss Federal Administrative Court, sheds light on the meaning of consistency in judicial decision making and contextualizes the main findings. The second part consists of the three papers that constitute this cumulative dissertation. The three papers are the following:

1. Hangartner, Dominik, Benjamin E. Lauderdale and Judith Spirig. 2018. "Inferring Individual Preferences from Group Decisions: Judicial Preference Variation and Aggregation in Asylum Appeals." Manuscript.
2. Spirig, Judith. 2018. "Do Fewer Judges Reach Different Decisions? Evidence from a Procedural Change in Asylum Appeal Decision Making." Manuscript.
3. Spirig, Judith. 2018. "It's in the News: The Impact of Asylum Issue Salience on Judicial Decision Making." Manuscript.

# Part A

# Synopsis

# 1

# On Inconsistency in Asylum Appeal Decision Making

## 1.1 Introduction

Asylum adjudication is a very particular area of judicial decision making, but it is by no means a small one. In many countries, including Switzerland, asylum appeal decisions comprise the largest share of judgments.[1] In terms of absolute numbers, this translates into 175,000 asylum appeal applications in Germany and 5,100 in Switzerland in 2016 alone.[2]

More so than in many other areas of administrative law, making correct decisions in asylum matters is often extremely challenging. Written proof is rare, and decisions frequently boil down to an assessment of the credibility of asylum seekers' claims (Thomas 2006; Valluy 2004). Beyond the legal challenges involved in ensuring the accuracy of decisions, asylum decision makers face another challenge: the (political) divisiveness of asylum issues. The arrival of asylum seekers and the presence of refugees have caused heated debates and frequently featured prominently in election and referendum campaigns around the globe. Whereas anti-immigration parties have been growing all over Europe over recent decades (see, for instance, van Spanje 2010), they have done particularly well in elections after the 2015 refugee protection crisis.[3] For example, the right-

1 See, for example, Thomas (2011) for the U.K., Colaiacovo (2013) for Canada and Jaillardon (2016) for France. In Switzerland, asylum appeals account for the largest share of judgments at the largest court.

2 See http://www.spiegel.de/politik/deutschland/fluechtlinge-zahl-der-asylklagen-nimmt-deutlich-zu-a-1168436.html.

3 See http://uk.businessinsider.com/map-shows-far-right-growth-across-europe-2016-3.

wing anti-immigration party in Switzerland, the Swiss People's Party, increased its share of seats in the National Council by 2.8 percentage points, reaching a historical vote share of over 29% in the 2015 Swiss elections.[4]

It is against this backdrop that I analyze the effects of extra-legal factors on judicial decision making. More specifically, I investigate whether the outcome of an asylum appeal is affected by i) which judge handles it, ii) if two or three judges decide it and iii) how salient asylum and refugee issues are at the time of decision making. Because decision-making procedures in asylum matters vary across countries, it is one purpose of this synopsis to briefly situate the Swiss asylum procedure in comparative perspective (Section 1.2). Its second purpose is to establish this dissertation's focus on inconsistency in decision making, as opposed to accuracy in decision making (Section 1.3). On the basis of these sections, I will embed and contextualize the main findings (Section 1.4) and expand on the central contributions of this dissertation (Section 1.5).

## 1.2 The Swiss Federal Administrative Court Asylum Divisions in Comparative Perspective

Since 2007, all asylum appeals in Switzerland have been decided by two asylum divisions within the Swiss Federal Administrative Court (FAC). Between 2007 and 2015, the FAC decided over 40,000 asylum appeals. The FAC is the appeals court of first and last instance in asylum matters in Switzerland.[5] It decides appeals of decisions in asylum matters by the Swiss Secretariat for Migration (SEM, previously named the Federal Office for Migration) or, in case of a request for revision, of decisions by the FAC asylum divisions themselves.

Judicial systems more generally, and asylum appeal decision making more specifically, vary in a number of features across different countries. The judicial selection system is just one of these features: whereas judges are appointed by royal decree in some countries, they are elected in popular elections, chosen by

4 See http://blogs.lse.ac.uk/europpblog/2015/10/24/the-2015-swiss-elections-a-landslide-win-for-the-right-despite-limited-changes-in-vote-shares/.

5 If an asylum seeker wants to appeal an FAC asylum appeal decision, she has to lodge it with the European Court of Human Rights.

courts themselves or elected to judicial office by the legislative branch of government in others. For the purpose of this dissertation, two additional features are particularly relevant: the number of judges on a panel and the number of court levels that appellants can appeal to. I will briefly characterize the layout of these institutional features in Swiss asylum appeal decision making before discussing some of the differences and similarities with Germany, France, the U.K. and the U.S.

### 1.2.1 Asylum Decision Making in Switzerland

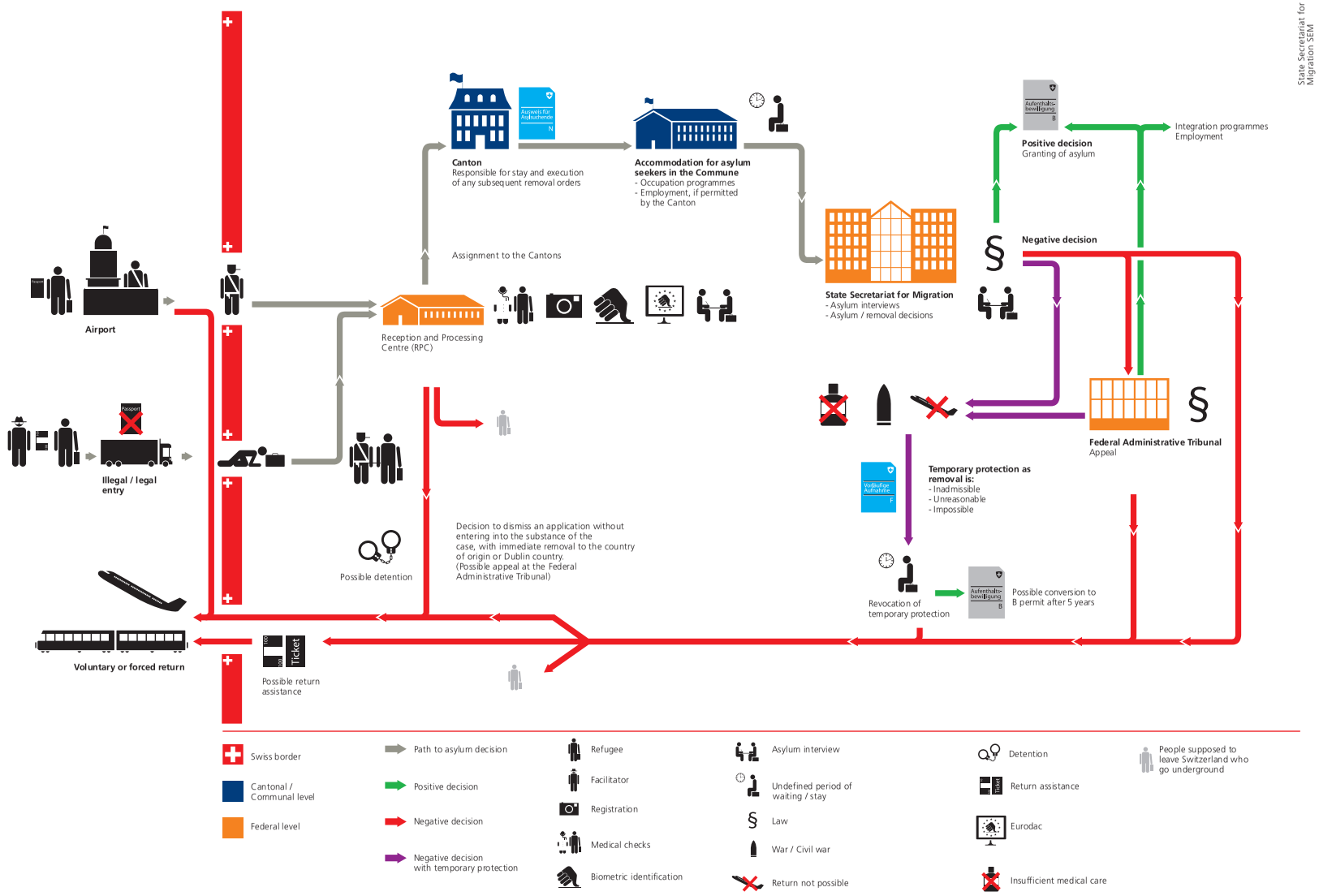
After an asylum seeker applies for asylum—directly in one of the reception and processing centers, at the airport or, as was possible until 2013, in one of the Swiss embassies abroad—her claim is processed, evaluated and decided by the SEM.[6] The SEM can deem an asylum application inadmissible 'without entering into the substance of the case', or, if it examines it in substance, reject or grant it. If the asylum application is granted, the asylum seeker receives a residence permit and is recognized as a refugee. If she receives a negative substantive decision, she is either requested to leave Switzerland or, if removal is deemed inadmissible, unreasonable or impossible, granted temporary protection (see Figure 1.1 for an overview). Asylum seekers who are not granted any form of protection are requested to leave Switzerland within a certain period of time. They are given between five working days and thirty calendar days (depending on the decision and, due to changes in asylum law, year) to appeal to the FAC. Most of the appeals decided by the FAC asylum divisions are of SEM asylum decisions such as these, but there are a number of additional asylum matters over which the court has jurisdiction.[7] Being the first and last level of appeal in asylum matters, it also handles requests for revisions of its own decisions.

Before 2007, prior to the FAC's existence, all asylum appeals were decided by the Swiss Asylum Appeals Commission (AAC) which was located within the same

6 Until 2005, the responsible unit was the Federal Office for Refugees. After its merger with the Federal Office of Immigration, Integration and Emigration, it changed its name to Federal Office for Migration (FOM). It has been called Swiss State Secretariat for Migration (SEM) since 2015.

7 See the list of competencies of the FAC asylum divisions in Section 1.A for further information.

**Figure 1.1:** Swiss Asylum Procedure




*Note*: Figure taken from the Swiss State Secretariat for Migration, see https://www.sem.admin.ch/sem/en/home/asyl/asylverfahren.html.

department as the asylum application adjudicatory body (now called the SEM). Even though the Swiss AAC was in many respects similar to the later FAC asylum divisions, the FAC's specific operations are characterized by a number of features that are essential for the empirical strategy adopted in this dissertation.

A first crucial feature concerns the assignment of cases to panels of judges. The software that assigns judges quasi-randomly onto panels and positions within panels was specifically developed for the FAC (is is named after its initial president) and is how the FAC ensures compliance with art. 30 par. 1 of the Federal Constitution of the Swiss Confederation.[8] A judge's position on a panel is relevant, because a different position implies a different role. The judge that is assigned to the first position on a panel, the chair judge, is first tasked with deciding if an appeal is to be dismissed on formal grounds or decided in substantive trial. Only with a substantive trial does she scrutinize the facts of the case, possibly acquire additional material, request written submissions from the SEM and/or the appellant and draft a decision. The complete file including the draft decision is then sequentially circulated to the second and the third judges, who can propose major or minor changes. If there are no disagreements, the chair judge finalizes the decision. In case of minor disagreements (on which the judges do not make their agreement depend), the chair judge briefly informs the other judges about the minor proposed changes she adopted, and then finalizes the decision. However, if there are major disagreements within the three-judge panel, the chair judge might write a 'position statement', and the whole procedure starts again. If the three judges cannot reach a decision after the second round, they have two options. Either they agree to meet in person, and if no consensus can be reached, a majority decision is sought. Or, if the disagreeing judge explicitly renounces a meeting, a majority decision can be taken directly without a meeting.

A second feature is the transparency of decision making. The FAC publishes anonymized versions of most substantive decisions on its web site, including

8 Art. 30 par. 1 of the Swiss Constitution stipulates that "[a]ny person whose case falls to be judicially decided has the right to have their case heard by a legally constituted, competent, independent and impartial court. Ad hoc courts are prohibited." For further information about how the 'Bandlimat', as the software is called, randomizes panel assignment, see the papers in this dissertation (especially Chapter B 1) and Schuppisser (2007).

the names of the judges who contributed to it.[9] It is a combination of these two features that creates the empirical backbone of this dissertation. Only the quasi-random assignment—or in its weaker form, the exogeneity of assignment—of judges to asylum appeals, in conjunction with information about which judges contributed to which decisions, allows me to attribute differences in grant rates to judges' behavior.

It is the selection system, however, that renders the case of the FAC asylum divisions both particularly appealing from a political science perspective and somewhat exceptional in comparative perspective. Judges are elected by the United Federal Assembly (the two parliamentary chambers of Switzerland) to the FAC asylum divisions for a duration of six years. To stand as a candidate, an aspiring FAC judge is informally required to be member (or at least a supporter) of a political party (see, e.g., Raselli 2011). The only time that non-partisan candidates were elected to the FAC asylum divisions was in 2005, the first election of asylum judges to the FAC, when non-partisan asylum judges from the AAC were nominated and elected. Since then, all candidates nominated for judicial office by the parliament's judiciary commission have been members or—in one case—supporters of one of the main political parties in Switzerland.

### 1.2.2 Asylum Appeal Decision Making in Comparative Perspective

Even though the Swiss asylum appeals procedure differentiates itself from the procedures adopted in other countries in many dimensions (see Table 1.1), it shares some essential features with those adopted in Germany, France, the U.K. and the U.S. These features, and the fact that asylum and refugee issues have

9 See https://www.bvger.ch/bvger/en/home/judgments/entscheiddatenbank-bvger.html. Note that in accordance with an agreement with the FAC, this dissertation refrains from identifying judges by name.

become dominant and divisive topics in many countries beyond Switzerland,[10] highlight the importance and topicality of the research questions addressed in this dissertation for asylum adjudication more broadly.

One similarity in all countries is that the courts tasked with deciding appeals of first instance asylum decisions assign between one and three judges to handle cases. In Switzerland, Germany, France and the U.S., the share of decisions that involve fewer than three judges has increased in recent decades (see below). Whereas the Swiss FAC has single judges decide cases they deem inadmissible, a single judge with the consent of a second judge has handled all cases 'clearly with or without merit' since 2008.[11] Therefore, since 2008, three-judge panels only handle cases that are not 'clear-cut'. At the U.S. Board of Immigration Appeals (BIA)(Legomsky and Rodriguez 2005) and German regional administrative courts (§6 Code of Administrative Court Procedure), single-judge decisions have become the standard. In 2015, France introduced a similar single-judge procedure for accelerated and inadmissible cases (Cour Nationale du Droit d'Asile 2017). In the U.K., like Germany and the U.S., most cases are decided by single judges, with the exception of particularly important or complicated ones.[12]

One important particularity of the Swiss system is that there is no higher court for asylum appeals. That is not to say that all asylum seekers whose appeal is rejected on the first level of appeal can have their appeals heard on the second level in other countries—in Germany and the U.S., for instance, a petition for leave has to be granted first. It does imply, however, that last-instance decisions are not made by fewer than three judges in other countries. In addition, court

10 Asylum and refugee issues featured prominently for example during the 2017 German general election, see http://www.dw.com/en/afd-cdu-spd-where-do-german-parties-stand-on-refugees-asylum-and-immigration/a-40610988; the 2017 French elections, see http://blogs.lse.ac.uk/europpblog/2017/04/15/immigration-a-consensual-issue-in-the-french-presidential-campaign/; the 2016 Brexit vote, see http://www.independent.co.uk/news/uk/politics/boris-johnson-eu-immigration-brexit-leave-campaign-alan-duncan-fears-a7981521.html; and the 2016 U.S. presidential elections, see https://www.theatlantic.com/politics/archive/2015/09/the-syrian-refugee-crisis-and-the-2016-campaign/406513/.

11 Only when the second judge disagrees with either the proposed decision or the classification of the appeal as 'clearly with or without merit' is the third judge re-assigned to the panel. The cases in which the second judge disagrees cannot be identified in the data. However, as suggested by a scribe at the court, this happens very rarely. In her experience, it happened in one out of about fifty cases.

12 See http://www.courtandtribunalsolutions.co.uk/what-we-do/immigration/.

**Table 1.1:** Asylum Appeal Courts (First Level)

| Country | Court | Selection Body | Levels | Panel Size | Party Affiliation |
|---|---|---|---|---|---|
| Switzerland | Federal Administrative Court | United Federal Assembly | 1 | 1-3 | Yes |
| Germany | Regional Administrative Courts | Local Government | 4 | 1, 3 | No |
| France | National Court of Asylum | Court (Vice-)President / Minister of Justice | 2 | 1, 3 | No |
| United Kingdom | First-Tier Tribunal (Immigration & Asylum) | Judicial Appointments Commission | 4 | 1, 3 | No |
| United States | Immigration Courts / Board of Immigration Appeals | U.S. Attorney General<br>U.S. Attorney General | 4<br>4 | 1<br>1, (3) | No<br>No |

*Note:* This table provides information about the first level of asylum appeals courts as of January 2018. Note that in the U.S. Immigration Courts are the first-instance body in defensive asylum applications and the second-instance body in affirmative asylum application proceedings. Appeals of Immigration Court decisions go to the BIA. The information in this table is drawn from various sources, including the official web pages of the courts, supporting materials and Asylum Information Database (AIDA) Country Reports (see http://www.asylumineurope.org/reports).

structures are also different in terms of centralization. In Germany and the U.K., asylum appeals are handled in different (regional) courts, depending on the asylum seeker's place of residence. In contrast, the Swiss FAC, the French National Court of Asylum and the U.S. BIA are centralized courts.

While no country other than Switzerland requires judges to be party members, politics is also involved in the selection of judges in the U.S. and Germany. Both Immigration Court and BIA judges are appointed by the U.S. Attorney General. In Germany, local governments are in charge of appointing judges to the German regional administrative courts (where judges do not exclusively decide asylum appeals). In the U.K., an independent commission that selects judges,[13] while in France, it is the (vice-)president of the administrative court (Conseil d'Etat), the president of the Court of Audit or the Minister of Justice who appoints the presiding judges to the National Court of Asylum. The three-judge panels at the French National Court of Asylum consist of a presiding judge and two 'qualified persons', one appointed by the UN Refugee Agency (UNHCR) and one appointed by the vice-president of the Conseil d'Etat.[14]

In sum, there are substantial differences between the lowest asylum appeals courts in Switzerland, Germany, France, the U.K. and the U.S. Whereas the Swiss FAC is explicitly politicized in the sense that asylum judges have to be party members at the time of election, in Germany and the U.S., the judicial selection procedure is implicitly politicized through the involvement of the executive branch of government. In France and the U.K., judges' ideology appears to play less of a role in judicial selection. Although judges' individual preferences can therefore not be directly linked to party affiliation in other countries, they can still matter for decision making, as a large literature has shown (see, for asylum adjudication, Ramji-Nogales et al. 2007). The second feature by which the Swiss asylum appeal system differentiates itself from other countries' systems is that the Federal Administrative Court is the court of first and last instance and does not allow for onward appeals in Switzerland.

Despite these differences, all courts covered in this section exhibit strong similar-

13 See https://jac.judiciary.gov.uk/commissioners.

14 See http://www.booksandideas.net/Judging-Homosexuality-Granting-Asylum.html for further information.

ities: the number of judges that make asylum appeal decisions, the trend toward smaller panels and the broader public salience of asylum and refugee issues. I take this finding to support the relevance of my dissertation beyond the FAC. While this section explored the comparative relevance of the questions addressed in this paper, the next section is dedicated to their substantive relevance.

## 1.3 Accuracy and Consistency in Judicial Decision Making

This dissertation's finding—that asylum appeal decisions are impacted by extra-legal factors—gains significance from the notion that extra-legal factors *should not* matter for judicial outcomes. This notion is expressed, for example, in the depictions of Lady Justice with a blindfold. In a sense, the blindfold implies that in order to reach an objective, just decision, Lady Justice has to shield herself from the influence of extra-legal factors (see, e.g., Spaeth et al. 1972). But what does 'shield herself' mean in the context of asylum appeal decision making? Are accurate decisions those that are made by two or three judges? Are those decisions accurate that are made in times when no one worries about arriving asylum seekers or those that are made when some people are worried?

While the challenge and importance of accuracy in asylum appeal decision making inspired this dissertation, it is a consequence of the adopted empirical strategy that I only observe whether decisions become *different* as a result of extra-legal factors. Although differences are suggestive of the existence of inaccurate decisions, I cannot make a clear judgment as to which decisions are accurate and which ones are not.

This has first of all to do with the difficulty of determining which judicial decisions are accurate, per se. When taking into account that judicial decisions are influenced by extra-legal factors, such as who makes them (see, e.g., Boyd et al. 2010; Glynn and Sen 2015; Shayo and Zussman 2011), it becomes clear how challenging it is to know what a just, accurate judicial decision is. In the absence of an exogenous rule to identify accurate decisions, both policy-makers and researchers (see, e.g., Boyd et al. 2010; Hessick and Jordan 2009; Spitzer and Talley 2011) have alluded to the importance of diversity in judicial decision-

making bodies.[15] In a way, by ensuring that the composition of the FAC reflects the relative strength of parties in the parliament, the Swiss judicial selection system takes note of this idea: it is one of the justifications for the judicial selection procedure that the judicial body is representative of society in terms of its socio-political views (Raselli 2011). Kornhauser and Sager (1986) provide theoretical support for the idea that more, not necessarily diverse, judges are more likely to make accurate decisions: if judges are on average more likely to make correct than incorrect decisions, if they decide by simple majority vote and if they are not influenced by other judges on the panel, the more judges vote, the higher the expected accuracy. Beyond judicial decision making, the findings in the literature on group decision making in a range of contexts also support the notion that more and more diverse decision makers reach better outcomes empirically (Page 2008; Surowiecki 2005), if—thereby confirming the importance of one of Kornhauser and Sager's (1986) assumptions—decision makers do not influence each other (see Lorenz et al. 2011).

Based on these considerations, we would assume that the most accurate decisions at the FAC are made en banc,[16] in a simple majority vote taken in a situation in which judges cannot influence each other. With regard to the influence of judges' identity on appeal outcomes, it would therefore be the FAC asylum divisions' median judge that makes the most accurate decisions. As a consequence, when estimating the inconsistency that derives from disparities in judges' preferred grant rates, we do so based on the median judge's preference and calculate the share of decisions that would have been decided differently by the court's median judge.

Judges' identity, however, is not the only relevant extra-legal factor. Even if we assume that judges are more likely to make accurate decisions than not on average: does that ability depend on issue salience? More normatively: should judges decide more restrictively in individual asylum appeals when citizens be-

15 Note that diversity of the judicial bench has not only been suggested in order to improve the accuracy, but also the representativity of judicial decisions (see Kornhauser and Sager 1986).

16 'En banc' decisions are decisions that are made by all judges at the court together.

come more anti-immigrant, or should judges be blind to those influences?[17]

It is beyond the scope of this dissertation to develop a normatively and theoretically elaborate understanding of accuracy in the context of asylum appeal decisions at the FAC. It is nevertheless important to point out that given the extra-legal factors that influence decisions, it is barely possible to find out what a decision would be in the absence of them, even if that were desired. What we can learn from the theoretical considerations in Kornhauser and Sager (1986) and the findings of the literature on group decision making (Lorenz et al. 2011; Surowiecki 2005) is, however, that under some conditions, larger groups of judges make more accurate decisions than smaller groups and that median judges are more likely to make accurate decisions than judges on the extremes.

Second, our understanding of inconsistency and to what extent it is connected to accuracy depends on assumptions about the indeterminacy of law. I have so far assumed that a judicial decision is always either accurate or inaccurate. For many judicial decisions, especially those that are routine applications of the law in individual cases such as asylum appeal decisions, many of us (see Kornhauser and Sager 1986) have the intuition that judicial decisions are correct or incorrect given the set of rules that apply. Yet, depending on the degree of legal indeterminacy, it is possible that there are inconsistencies in decision making that are a consequence of a lack of clear rules that leaves space for interpretation. Hence, even if extra-legal factors might lead to seeming inconsistencies, that is not necessarily a sign of inaccuracy (see Fischman 2013*b*). Therefore, while disparities point us toward the existence of judicial inconsistency, we have to make assumptions about the degree of legal indeterminacy to interpret it substantially.

Given these constraints, I will largely refrain from judgments about which decisions are more or less likely to be accurate. The focus on consistency, however—whether like appeals are decided alike—is not only relevant insofar as it raises questions about accuracy but also has merit in its own right, as it says something about the fairness of the procedure and the predictability of decisions. As Kornhauser and Sager (1986, 104) put it:

17 Note that the FAC Code of Judicial Conduct explicitly states: "Judges shall not allow their judgments to be influenced by pressures exerted by the general public, by litigants or by third parties. They shall also avoid any appearance of being influenced in any way." See https://www.bvger.ch/dam/bvger/en/dokumente/2016/05/ethikcharta.pdf.

> Where two legal rules attach different legal consequences to the same stipulated set of relevant circumstances the rules are inconsistent. So understood, consistency is not hard to justify as a virtue. It serves the goal of treating persons subject to the adjudicatory process fairly, and is essential to the ability of affected persons to anticipate legal outcomes and plan their affairs accordingly.

The lack of predictability is particularly challenging for asylum seekers. Given the enormous impact of the final asylum decision on appellants' lives, being unable to plan affairs accordingly means that asylum seekers' lives are essentially put on hold during the asylum decision-making procedure.[18] It is in this context that my dissertation provides evidence of the effect of extra-legal factors on the consistency of asylum appeal decision making. While they point toward the existence of inaccurate decisions, they first and foremost highlight deficiencies in the equal treatment of appellants before the law.

## 1.4 Summary of Findings

This dissertation is not the first effort to research inconsistencies in asylum appeal decision making. Since Ramji-Nogales et al. (2007) documented large disparities between asylum adjudicators in the U.S., several further studies in Canada (see, e.g., Rehaag 2007) and the U.S. (Fischman 2011, 2013*b*) have uncovered similarly large disparities.[19] This dissertation is the first work, however, to quantify disparities in asylum appeal decision making in a European country. Even though there were European movements comparable to the American legal realist movement in the early 20th century (for example, the German *Freirechtsbewegung* and *Scandinavian Legal Realism*) the systematic empirical research on judicial decision making started by American political scientists in the mid-twentieth century has only recently begun to emerge in Europe (see Dyevre

18 See Hainmueller et al. (2016) for more details on what that means in terms of labor market integration.

19 Note, however, that Ramji-Nogales et al. (2007) could not analyze between-judge disparities for the BIA, the court that comes closest to the FAC asylum divisions.

2010).[20]

It is also, to my knowledge, the first study to estimate judges' individual preferences based on joint panel decisions that do not report individual votes. Studies, including some outside asylum appeal decision making, which investigate whether some judges have a disproportionate influence on a panel's joint decision—known as 'panel effects'—usually rely on courts in the U.S., which provide information about judges' individual votes. In Europe, this is much less common. The FAC specifies the names of judges on a given panel, but does not give information about judges' individual votes. To ascertain judges' individual preferences, we leverage the quasi-random allocation of judges onto panels and positions within panels (see Chapter B 1, co-authored with Dominik Hangartner and Benjamin E. Lauderdale). By doing so, we shed light on how judges aggregate individual preferences into a joint decision, which at the same time allows us to estimate to what extent judges' individually preferred grant rates vary.

We compare a variety of possible aggregations rules—such as that the median judge is decisive, or that instead, the chair, second, or third judge is decisive, or who is the most restrictive or the most liberal judge on the panel—and find that three-judge panel decisions of appeals submitted in 2007 are best explained under an aggregation rule that is a mix of median and chair-as-dictator models. Whereas some cases are determined by the chair judge, others follow the median judge's preference. Estimating judges' individually preferred grant rates on the basis of the best-fitting aggregation model, we document that it does indeed matter which judges are assigned to handle an appeal. While more liberal judges would grant on average about 50% of substantively tried cases in 2007, the most restrictive judges would only grant about 10%. Despite considerable within-party variation, there is a correlation between judges' party affiliation and restrictiveness: on average, judges affiliated with the right-wing Swiss People's Party are more restrictive than judges affiliated with the left-wing Social

20 According to Rehder (2007), the main reason for this is to be found in the very late, post-World War II, establishment of constitutional courts in Europe. This focus shaped contemporary European judicial politics literature in such a way that it very rarely examines judicial behavior as anything other but a mechanical application of the law. Rather, it focuses on the process of juridification, "the political effects of judicial action" (Rehder 2007, 10). Hence, the skepticism toward the judge as a simple translator of the law that emerged primarily in the U.S. has only recently started to make its way to Europe (see Dyevre 2010).

Democratic Party. Drawing on the whole set of appeals decided between 2007 and 2015, we also show that the differences between parties' average preferred grant rates persist over time.

The focus on one particular court, the FAC, not only facilitates the identification and comparison of judges' individual preferences, but also provides a backdrop against which I can gather systematic evidence on the influence of other extra-legal factors, such as panel size and issue salience. Neither of these factors have received their deserved attention in judicial politics, particularly not in asylum appeal research. The second paper (see Chapter B 2) takes advantage of a new case-handling procedure at the court, introduced because of a partial revision of the Swiss Asylum Act, to estimate the effect of having fewer judges decide a case on its probability of being granted. While all appeals that were tried substantively were decided by (at least) three-judge panels in 2007,[21] those classified as 'clearly with or without merit' by the chair judge have subsequently been handled by just her, with the consent of a second judge.

Because of the temporal variation in whether a case is handled by three judges or one with the consent of a second, I can compare if similar cases were decided differently as a consequence of the initiated procedure. To do so, I employ a fuzzy 'donut hole' regression discontinuity (RD) design. This design not only allows me to account for the phasing-in period of the new procedure, but also sheds light on which appeals are most likely to be affected by the introduction of the new procedure. I find that the so-called simplified procedure led to an overall decrease in the grant rate around January 1, 2008 of eight percentage points. For those cases that were directly affected by the new procedure—the ones that would have been decided by a three-judge panel had they been submitted before 2008, but were decided by a single judge with the consent of a second, because they were submitted after January 1, 2008, and vice versa—the grant rate decreased by 23 percentage points. Among the affected cases were a disproportionate number from Nigerian appellants, many lodged against first-instance dismissal decisions and many handled by judges from center-right parties.

21 Note that a small subset of cases is decided by five-judge panels. A five-judge panel can be requested by any judge assigned to the panel (with the agreement of the president of the division) at any point during the procedure if she or he considers the appeal to raise legal questions which induce a fundamental change in practice or a precedent.

The third paper (see Chapter B 3) assesses the impact of the public and political salience of asylum and refugee issues on judicial decision making. More so than in other areas of the law, asylum judges operate in a field that has caused divisive discussions among both the public and political elites to varying degrees over time. Building on the observation that the degree to which voters perceive asylum and refugee issues to be one of the most important problems varies over time, I study the effect of asylum issue salience, proxied by the amount of newspaper coverage devoted to asylum and refugee issues in Switzerland, on asylum appeals' grant rate. I find that judges are more likely to reject asylum appeals in times of high asylum issue salience. This effect is neither restricted to right- or left-wing judges, nor is it solely driven by higher asylum application numbers. An exploration of the topics featured in the newspaper articles indicates that the variation in judges' behavior is attributable to media coverage of publicly divisive topics such as the accommodation of asylum seekers, rather than to federal-level asylum policy debates.

Taken together, this dissertation sheds light on three different sources of disparities in asylum appeal decision making at the FAC. Beyond the merits of an appeal, it is the identity of the judges that decide it, the size of the panel that handles it and the prevailing salience of asylum and refugee issues that can make the difference between whether an asylum seeker can stay in Switzerland or has to return to her country of origin. These findings raise doubt about the consistency of asylum appeal decision making and suggest that not all like cases are treated alike. Thereby, they not only highlight deficiencies in the fair treatment of all appellants, but also call into question the accuracy of some decisions, are we to believe that Swiss asylum law does not leave judges largely unconstrained in their decision making (see Fischman 2013*b*).

In a broader sense, this dissertation has two main implications for the study of inconsistency in judicial decision making. First, it emphasizes the crucial role of court structures in the facilitation or containment of inconsistencies. In particular, the inconsistencies documented in Chapters B 1 and 2 arise on the basis of decision-making procedures that are far from optimal in terms of the conditions laid out in the literature on judicial group decision making. Rather, both the sequentiality of the decision-making procedure and the introduction of the new procedure promote aggregation rules that are different from a simple majority

vote with no panel effects. Therefore, it is not the case that inconsistencies at the FAC exist despite optimal decision-making structures. This is good news, because it suggests that even (or particularly so) in judicial systems that are as politicized as the Swiss one, we can turn to the literature on judicial group decision making for suggestions of optimal decision-making procedures. Accordingly, if the reduction of inconsistency across panels is a goal, procedures that promote simultaneous and independent instead of sequential decision making in (larger) groups of judges would be a way forward for the FAC.

Second, this dissertation also shows that while changes in decision-making procedures could contain inconsistencies that stem from factors that do not affect the position of the median judge (i.e., are time-invariant and influence judges differently), they cannot reduce inconsistencies that arise from factors that change the court's median (i.e., that shift the whole distribution of judges' preferences and/or are time-variant). Asylum issue salience (see Chapter B 3) is such a factor. Even if all decisions at the FAC were made in panels of, say, five judges, who decide independently by a simple majority vote, variation in issue salience would still lead to inconsistencies, because it increases the restrictiveness of the court's median. This suggests that there are different categories of extra-legal factors that, if inconsistency reduction is a goal, require different approaches. While the literature on judicial group decision making outlines ways to address one set of factors (those that do not change the position of the median), it does not yet provide solutions for the second set of factors. More research is needed within and beyond the field of judicial politics to address this second category of factors.

Of course, these findings have to be interpreted within the limitations of this dissertation. As it focuses solely on one particular court, it cannot provide straightforward suggestions as to the extent to which its findings are applicable to other contexts. Given that some of the institutional features of the FAC are highly distinctive, such as judges' party affiliation, one should be careful with broad generalizations. As Section 1.2 illustrates, however, the questions asked in this dissertation are highly relevant and topical beyond Switzerland. At the very least, therefore, my findings confirm that there is ample need for more research on the effects of the studied extra-legal factors on asylum appeal decisions in other countries.

An empirical limitation that I would like to note is the existence of leading decisions. While most decisions of the FAC asylum divisions concern individual cases, some decisions—those addressing new legal questions, for example—are decided by five judges and considered leading decisions. These decisions, once reached, have an impact on the decision of other, similar, cases. It is beyond the scope of this dissertation to systematically account for that influence, particularly with regard to over-time inconsistency. With regard to the differences between judges' individual preferences, however, leading decisions should, if anything, theoretically have a moderating effect. If judges decide cases more similarly as a consequence of issued leading decisions, this would lead to an underestimation of the actual differences between judges' individual preferences.

## 1.5 Contributions

My findings have implications for several debates and strands of literature. First of all, they contribute to the literature studying the effect of judges' identity on the decisions that they make. Even though a number of studies, especially in the U.S., have already indicated that judges' identity matters (Abrams et al. 2012; Boyd et al. 2010; Lauderdale and Clark 2012; Sunstein et al. 2007), the results from the first paper provide evidence that these effects also exist in a civil law country like Switzerland. In comparison with the disparities documented at U.S. immigration courts in Ramji-Nogales et al. (2007), the differences between FAC judges' preferred grant rates seem relatively modest.[22] This might suggest that differences between judges' (preferred) grant rates are smaller in civil law countries more generally, fitting in well with the perception that the civil law system favors cooperative as opposed to individualistic behavior (Dyevre 2010). Given that judges on the FAC are members of political parties and asylum adjudication is a politically divisive issue, the results might therefore indicate an upper bound for the effect of judges' identity on judicial decisions in civil law countries.

Our finding that it is not always the median, but frequently the chair judge, who

22 Note, however, that the U.S. immigration courts are somewhere between the initial asylum adjudication body and the first level of appeal and exclusively have single-judge decisions.

is decisive in three-judge panels is instructive for a variety of fields. It not only contributes to the literature on panel effects and the interaction of panel members (Fischman 2013*a*; Kastellec 2013; Spitzer and Talley 2011) in that it suggests that we have to pay attention to institutional factors in addition to judges' ascriptive characteristics, but also to a much broader literature on group decision making beyond judicial politics (see, e.g., Lorenz et al. 2011). More practically, it also has implications for the study of courts in comparative perspective through highlighting the importance of the decision-making procedure for the adopted aggregation rule.

The second and third papers have implications for the study of judicial politics more broadly, but especially insofar as they shed light on two determinants of judicial decisions that have found scant attention as of yet. My finding that fewer judges are more likely to reject asylum appeals than more judges has implications for both the theoretical and empirical work on the trade-off between efficiency and consistency in decision making (Alarie et al. 2011; Kornhauser and Sager 1986). In particular, it highlights that if the average probability of cases to be granted is relatively low, reducing the number of judges—even if not to one—leads to a decrease in the grant rate that cannot be explained by differences in cases' merits, even if the cases are arguably 'clear-cut'.

The main contribution of the paper on the impact of asylum issue salience on judges' decisions is twofold. On the one hand, it adds evidence to the growing literature on court-exogenous factors that influence judicial decision making (Bonneau et al. 2007; Lim et al. 2015). Whereas research has considered long-term public opinion trends and media coverage of court decisions as relevant factors, variation in the public and political salience of the broader topic within which cases are embedded has not been widely studied (see Shayo and Zussman (2011) for an exception). On the other hand, it adds to the literature that studies the effect of immigration on voters' attitudes toward immigrants, particularly in interaction with media coverage (Dustmann et al. 2018; Hopkins 2010; Steinmayr 2016). So far, this literature has focused on voters, but my results suggest that similar processes might be at play for expert decision makers such as asylum judges.

This dissertation also prompts a number of questions and highlights the need for

more research into judges' behavior, particularly in asylum appeal adjudication. For example, given that the effect of extra-judicial factors is much less studied in Europe than in the U.S., would raising judges' awareness of these factors lead to a reduction in disparities? Rachlinski et al. (2008) show that raising awareness of the existence of implicit biases in decision making among judges can limit those biases. Is that also possible for factors such as issue salience? Another question relates to how courts can learn from one another to optimize decision making in a way that facilitates consistency. My dissertation suggests that under a sequential decision-making structure, it is not necessarily the median judge who evolves as decisive for the outcome of a decision. Would a simultaneous decision-making structure reduce inconsistency by facilitating the emergence of a simple majority vote rule? Which other, manipulable features of a court's structure impact on the consistency of decision making? Finally, research about the impact of panel size on the accuracy of decisions suggests that the effect of panel size is moderated by the complexity of a case (Alarie et al. 2011). Because I find that panel size reduction has a sizable effect on the probability of cases 'clearly with or without merit' to be granted, further research could address empirically whether complex cases are affected more by changes in panel size.

It is my hope that this dissertation on decision making at the Swiss Federal Administrative Court illuminates the relevance and significance of extra-legal factors in asylum appeal adjudication. By providing empirical evidence of disparities in judicial decision making, it raises concerns about the equal treatment of appellants before the law and aspires to contribute toward a better understanding of the mechanisms at work. Thereby, it also aims to inspire further research on asylum decision making in other countries and contexts.

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# Appendix

## 1.A Competencies of the Swiss Federal Administrative Court Asylum Divisions

The following list of competencies of the FAC asylum divisions are taken from Uebersax et al. (2009, 574–576).

The FAC asylum divisions are responsible for adjudicating appeals of decisions by the Federal Office for Migration (FOM, now: State Secretariat for Migration (SEM)) regarding:

- Asylum applications in Switzerland (ordinary procedure)
- Asylum applications at the airport
- Asylum applications abroad
- Allocation to a canton of residence for the duration of the asylum procedure and denial of a request to change cantons
- Precautionary measures ordered by the FOM, provided they may cause permanent prejudice
- Orders that suspend proceedings of the lower adjudicatory body (the FOM)
- Grants of the suspensive effect of appeal in Dublin proceedings
- Order of detention pursuant to Aliens Act, art. 76, para. 1, let. b(5)
- Rejection or inadmissibility decision of reconsideration requests
- Revocation of asylum or withdrawal of refugee status
- Termination of temporary protection
- Revocation of temporary protection granted during the asylum procedure
- Denial of residence permit requested by the canton of residence due to "serious personal hardship"

The FAC is also responsible for the examination of applications for revisions of its own judgments (art. 45 et seq. ACA). In addition, the FAC asylum divisions are responsible for adjudicating motions to disqualify a judge, explaining and correcting their own decisions (art. 48 ACA) and deciding applications to restore time limits (art. 24 APA) and to resume appeal proceedings. These cases are not

covered in the dataset used for this dissertation, because they are not considered asylum matters.

# Part B

# Papers

# 1

# Inferring Individual Preferences from Group Decisions: Judicial Preference Variation and Aggregation in Asylum Appeals

Dominik Hangartner, Benjamin E. Lauderdale and Judith Spirig*

Recent studies of asylum adjudication in the U.S. and Canada have found sizeable disparities between individual adjudicators. We contribute to this literature by focusing on the Swiss Federal Administrative Court, a case that is methodologically challenging since we only observe the decision of the panel, not judges' individual opinions, and politically relevant, since judges have known party affiliations. Several features of the Swiss asylum appeal process combine to offer an unusual opportunity to examine judges' revealed preferences: asylum cases are assigned at random (conditional on language) to panels of judges and have a common, unidimensional structure, as all decisions typically involve the appeal of an initial asylum decision. As a result, we can test which of several decision-theoretic models of group decision making appear to best fit the panel decisions, as well as inferring the judges' individual preferences. The analysis of the universe of asylum decisions made between 2007 and 2015 shows that inconsistencies in decision making due to panel composition are substantial from the court's establishment to the end of the study period and that judges' estimated preferences are strongly correlated with their party membership in expected ways. In addition, the methodology we propose to infer individual preferences from repeated group decisions has the potential for fruitful application in a variety of other contexts.

* Each author has contributed to this paper significantly and participated in the work equally. Names are listed in alphabetical order. For a more detailed list of author contributions, see Section 1.B in the Appendix.

## 1.1 Introduction

In summer 2007, the Swiss Federal Administrative Court (FAC) had to decide two unrelated appeals of rejected asylum seekers from Afghanistan. Both appellants were male, of Hazara ethnicity, Shiite Muslims from Kabul and with family still living there. On July 4, a panel of three judges chaired by a member of the Social Democratic Party ruled that the current situation in Kabul cannot be considered 'reasonable' for removal and that the asylum seeker had to be granted subsidiary protection. Two months later, on September 3, another panel consisting of three different judges chaired by an independent judge rejected the appeal of the other asylum seeker: the panel wrote in their verdict that removal to Afghanistan is 'admissible' and 'reasonable'. As a consequence, the rejected asylum seeker had to leave Switzerland within a few days.

A close reading of the two verdicts[1] reveals few differences in the merits of the cases that could explain the radically different outcomes. This raises two questions: If cases' merits do not explain the different outcomes, do the different judges on the panel? And if so, do such disparities exist in asylum appeal adjudication more generally?

Consistency in adjudication is central to the legitimacy of the judiciary (see, e.g., Kornhauser and Sager 1986). Consistency ensures that like cases are treated alike, thereby safeguarding the fair treatment of disputing parties and increasing the predictability of the decisions of the court. Only a court that applies the law consistently can fulfil the promise of 'equality before the law'—a legal principle that is fundamental to liberal democracies and frequently enshrined in the constitution. In Switzerland, for example, Article 8(1) of the constitution guarantees that "every person is equal before the law." Since inconsistency in judicial decision making, that is, different decisions for cases of the same merits and law, would violate the very essence of this isonomy principle, it has been the subject of much empirical scholarship—running the gamut from partisan adjudication of challenges to the U.S. Environmental Protection Agency (Revesz 1997) to ethnic in-group bias in Israeli small claims courts (Shayo and Zussman 2011).

1 See FAC decisions E-3570/2006 and D-4576/2007.

In the context of asylum adjudication, a small but focused literature, primarily focused on the U.S. and Canada, has examined disparities at several stages of the asylum process, from the initial application to the final appeal at the highest courts (Fischman 2011; Ramji-Nogales et al. 2007; Rehaag 2007). All these studies find substantial heterogeneity in the decisions of asylum officers, judges and appeal courts. Ramji-Nogales et al. (2007), for instance, show that for Columbian cases before the Miami Immigration Court between 2000 and 2004, judges' grant rate varied between 5% and 88%.

Some of the asylum environments covered by these studies[2] feature (quasi-) random assignment of cases to asylum officers or judges, which allows the authors to causally attribute differences in grant rates to the different decision makers. Most of these studies rely on data obtained (often through Freedom of Information requests) from governing institutions, which usually insist on protecting the identity of the decision maker and replacing it with an anonymous identifier. Thus, correlating discrepancies in asylum appeal adjudication with relevant characteristics of judges, such as political ideology, is frequently not possible.[3]

We contribute to this literature and overcome this limitation by focusing on the universe of all asylum appeals decided by the Swiss FAC between 2007–2015 (40,506 unique decisions). Like most other countries that are signatories to the 1951 Refugee Convention (and its amendment), an asylum seeker whose claim is rejected by the Swiss authorities has the right to appeal the initial decision. Since 2007, the approximately thirty judges of the FAC centrally decide on all such appeals, on average totalling about 3,000 decisions per year. Unlike most countries, judges serving on the Swiss FAC have publicly known party memberships, are nominated by the national parliament's judiciary commission in agreement with the relevant parliamentary faction and are voted into judicial office by the members of the national parliament. While not written law, there is an informal agreement that the body of elected judges reflects the relative seat share of the different parties in parliament. These voluntary party quotas

2 Fischman (2011) focuses on asylum appeals at the U.S. federal circuit court level, which features random assignment. The U.S. immigration courts studied by Ramji-Nogales et al. (2007) also use random assignment of cases *within* courts, but assignment to the 53 courts is based on residence, which likely confounds comparisons across courts.

3 One exception, focusing on layman judges in Sweden, is Martén (2015).

(Kiener 2001) ensure that the different political ideologies represented in Swiss society are also represented on the court. One potential drawback of this heavily politicized nomination process—and the focus of this study—is that judges might be selected and incentivized to reach verdicts in line with the preferences of their counterparts in the parliament.

Several features of the appeal process help us overcome challenges typically associated with studying disparities in asylum appeal adjudication and judicial behavior. First, all appeals have a common, unidimensional structure, since they exclusively deal with asylum issues. While the assumption that judges' preferences are dominantly unidimensional is often invoked in judicial politics, there is historical (Greenhouse 2007; Jeffries 2001) and statistical (Lauderdale and Clark 2012) evidence that judges' preferences vary across areas of the law. In the context of our study, however, the unidimensionality assumption seems much more credible, as decisions typically involve the appeal of an initial asylum or subsidiary protection decision or a closely related asylum matter.

Second, the FAC processes all asylum appeal decisions lodged in Switzerland. In other studies (for example, Ramji-Nogales et al. 2007), differences in the average merits of cases submitted to different regional offices (U.S. Immigration Courts) frequently undermine the comparability of estimated preferences across offices. This is not a concern in our context, where all appeals are centrally processed by the two asylum appeal divisions of the FAC. Third, a bespoke software program with the objective function of minimizing workload imbalance assigns cases to panels of three judges. The automated assignment is independent of the merits of a case and judges' characteristics conditional on the language of the asylum decision. This allows us to attribute differences in grant rates to differences in panel composition.

Fourth, we only observe the aggregate decision of the panel, not the individual votes of the judges. While this creates some interesting inferential challenges, we do observe the role (chair, second, or third) of the three judges assigned to the same panel. This information allows us to formulate a variety of aggregation rules and test them against one another using data from thousands of randomly allocated panels. Fifth, judges' identities and party affiliations are public knowledge. This allows us to correlate differences in grant rates with differences in

judges' ideology, proxied by their party membership.

To correlate variation in appeal decisions with judges' party membership, we first have to infer their individual preferences from panel decisions. In contrast to courts in other countries, the verdicts of the FAC do not record judges' individual votes, but only the aggregate panel decision. To overcome this inferential challenge, we estimate a variety of models using different aggregation rules to test which fits the data best. We find that the best-fitting simple aggregation rule is that only the chair judge's preference matters, closely followed by a model in which the panel decisions reflect the median judge's preference. Consistent with the decision-making procedures at the court, we also show that a (Bayesian) mixture model of the chair and median models fits better than either of these simple aggregation rules, indicating that the chair has some latitude to deviate from the median's preferences. Based on the best-fitting mixture model, we find that asylum seekers who submitted comparable appeals in 2007 faced substantially different grant rates, depending on the panel of judges their case was assigned to.

In addition, we fit models to examine the evolving pattern of decision making and the associated inconsistency rates over time. While the inconsistency rate, i.e., the proportion of cases that would have been decided differently according to the preference of the court's median judge, fluctuates between 5.5% and 9.4%, we find no evidence that judges' preferences converged over time. If anything, the slightly higher inconsistency rate in the most recent years suggests that the issue of preference variation in asylum appeal adjudication is a permanent fixture of this highly politicized court.

Our study makes several contributions. First, our findings have important implications for the comparative literature that studies disparities in asylum adjudication. While most studies to date show sizeable disparities in asylum adjudication between decision makers that potentially face different cases (Fischman 2011; Law 2004; Ramji-Nogales et al. 2007; Taylor 2007), our results provide clear causal evidence that the identity of judges matters when facing cases with, in expectation, the same merits.

Second, we add new empirical evidence to the growing literature on the effects of judges' identity on their decisions. Previous research has shown that charac-

teristics such as gender (Boyd et al. 2010; Glynn and Sen 2015; Peresie 2005), ethnicity or race (Abrams et al. 2012; Gazal-Ayal and Sulitzeanu-Kenan 2010; Grossman et al. 2016; Shayo and Zussman 2011) and ideology (Ashenfelter et al. 1995; Epstein et al. 2013; Sunstein et al. 2007) all impact judicial behavior. We provide some of the most direct evidence to date that judges' political ideology, proxied by their party affiliation, shapes preferences over asylum appeals in expected ways.

Third, our study adds to the growing literature on group decision making (Bonneau et al. 2007; Sunstein et al. 2007), preference aggregation (Fischman 2011; Van Dijk et al. 2014) and the effects of social interactions of panel members (Fischman 2013; Kastellec 2013). Previous studies (for example, Fischman 2011) that infer individual preferences using *item response theory*-type models rely on the *individual* votes of decision makers. We explore a context where individual votes are not reported, and only the group's joint verdict is observed. Nonetheless, by leveraging the random and repeated allocation of judges to panels, we are able to recover individual preferences from joint group decisions by fitting a variety of aggregation rules. This framework has the potential for a wide range of applications, since joint decisions without any recorded information on individual votes is the norm in many repeated decision-making environments. In the conclusion, we discuss promising applications of this methodology outside of the realm of judicial politics.

The rest of the paper is structured as follows. The next section provides background information about the structure of decision making at the FAC and the election of its judges. Section 1.3 describes the proposed methodology based on the case-space model, how we infer individual preferences from group decisions and how we estimate the court's inconsistency rate over time. After summarizing the data and measures in Section 1.4, we detail the results in Section 1.5. Section 1.6 discusses the legal and political implications of our findings and concludes the paper.

## 1.2 Asylum Appeals and the Swiss Federal Administrative Court

Like most other countries, Switzerland grants asylum in accordance with the 1951 Refugee Convention relating to the status of refugees and the 1967 Protocol. Asylum applications are processed by the State Secretariat for Migration (SEM). Of the 26,000 asylum applications decided in 2012, roughly the mid-point of our study period, only 15% were granted (UNHCR 2013) and more than 10% were appealed.[4] In the event of a negative substantive decision,[5] the applicant has thirty days to lodge an appeal. (If the asylum request is dismissed without entering into the substance of the case, the appeal window shortens to only five working days.) All such appeals are handled by the FAC.[6] Since the verdicts of the FAC are, in general, not appealable to the Swiss Federal Supreme Court, the FAC is effectively the court of last resort in the Swiss asylum process.

### 1.2.1 Election of Judges by the Swiss Parliament

The approximately thirty judges belonging to the two divisions of the FAC handle, on average, about 3,000 appeals per year. Unlike in other countries where it is frequently the executive branch that nominates candidates for judicial office, judges of the FAC are nominated and voted into office by the United Federal Assembly, i.e., the joint meeting of the two chambers of the Swiss National Parliament, for a term of six years, with no term limits. In recent years, with one exception, all judge candidates had a known party affiliation (in the first elec-

4 Viewed in a comparative perspective, Switzerland received a relatively high share of asylum applications in the last decade (see, e.g., Bansak et al. 2017). Similar to developments in many other European countries, the increasing number of asylum applications in recent years has made asylum policies, including the appeal process, a heavily contested issue, with right-wing parties such as the Swiss People's Party leveraging it as an effective springboard for rallying their voters. See Chapter B 3 for further information on this.

5 A negative substantive decision is the rejection of an asylum application that the SEM has tried substantively, i.e., one in which the SEM has 'entered into the substance of the case'.

6 Before the court's establishment in 2007, decisions were handled by mostly the same judges, but within the Swiss Asylum Appeal Commission, which was part of the Federal Department of Justice and Police, the same department that also supervises the SEM.

tion, a few ran as independents, see Chapter B 3 for more information) and were backed by their party when running for office.[7] While not written law, there is an informal rule that the body of elected judges reflects the relative seat share of the different parties in parliament. One of the ideas behind this norm is to select a judiciary that is representative of the people over which it has to rule (Kiener 2001; Raselli 2011). By establishing a system in which all parties have a share of judges that is approximately proportional to their strength in the parliament, the Swiss "solution" ensures that all political ideologies are 'adequately' represented at the court.[8]

A potential drawback of this system of judiciary election is the threat of a heavily politicized court. If judges see themselves mainly as agents of their party, we might worry that their verdicts are also influenced by the political ideology of their party. This could either be the result of the selection process by which aspiring judges choose parties or of the re-election process that incentivizes judges to reach verdicts in line with the preferences of their counterparts in parliament.[9] In both instances, we would expect to see substantial variation in the adjudication of asylum appeals across judges from different parties and a correspondence between judges' grant rates and their parties' general stance on asylum issues.

### 1.2.2 Asylum Appeal Procedure and the Structure of Panel Decisions

When receiving a new asylum appeal, the FAC identifies the language of the asylum decision (German, French, or Italian) and forwards, on an alternating basis, the case to one of the chambers of its two asylum divisions. A bespoke software program called 'Bandlimat', named after the first president of the FAC, assigns the appeal to a three-judge panel and determines judges' roles as chair, second and third judge. When sequentially assigning cases to judges, the Bandlimat solely considers (i) the language of the asylum decision, (ii) the urgency

7 The exception is a judge who supports the Green Party, but is not a member.

8 Note, however, that this principle of proportionality is not strictly enforced, if, for example, the judiciary commission cannot find candidates with the relevant qualifications for underrepresented parties. Accordingly, the Swiss People's Party, which holds the most seats in the parliament, has been underrepresented at the FAC, in particular in its early years.

9 Note, however, that re-elections are not competitive.

of the appeal, (iii) judges' language skills and (iv) their current workload. The assignment of cases is completely mechanical, and interference with the software's assignment has to be justified, logged and entered by the president of the court.[10] The objective function of the software is to minimize the imbalance in workload created by case assignment (each case has an identical weight of one) under constraints (i)–(iii). With the exception of the language of the appeal, all constraints are orthogonal to the identity and characteristics of judges, such that in expectation, the assignment of cases by the Bandlimat is (conditionally on language) as good as random. We use a series of placebo checks to test this assumption in the next section.

The court employs two distinct decision-making procedures to decide on asylum appeals that it tries substantively.[11] During the first year of the court's existence, all substantively tried cases were handled through the 'ordinary procedure' that is characterized by the following structure: the chair judge receives the case files, makes additional investigations if necessary, assigns one of her clerks to draft a decision and forwards all materials to the second judge. The second judge reads the case files and the draft decision, either agrees or disagrees and proposes changes and forwards everything to the third judge. The third judge reads the case files, the draft decision and the comments of the second judge, and either agrees or disagrees and proposes changes and returns the file and her comments to the chair. In the event of disagreement, the panel further circulates and possibly revises the decision. If the three judges are not able to reach a consensus, the outcome is decided by voting by majority rule.

A partial revision of the Swiss Asylum Law led to the introduction of an alternative 'simplified procedure' at the court in 2008.[12] Since January 1, 2008, the simplified procedure has allowed the chair judge to classify certain cases that are regulated by the court's guidelines as either 'with or without merit'. In the vast majority of instances, the simplified procedure is applied to cases that are 'clearly without merit'. The initial assignment of cases to three-judge panels

10 See, for details, the law guiding the FAC's standard operating procedure, art. 21, par. 1 ACA.

11 Note that cases that do not fulfill the formal requirements are 'dismissed without entering into the substance of the case' by the chair judge in a single-judge procedure.

12 See Chapter B 2 for further information on the new procedure.

is the same for both procedures. When the chair judge invokes the simplified procedure, she only needs the second judge to agree with her classification and the verdict. If the second judge agrees with both, the decision-making process ends here, and the file is not forwarded to the third judge. If the second judge disagrees, the process reverts to the ordinary procedure.

Appeals decided by the simplified procedure are a highly selective subset of all cases. Furthermore, Figure 1.7 in the Appendix reveals that judges vary considerably in their propensity to invoke the simplified procedure. To circumnavigate any selection issues arising from these differing definitions of what constitutes appeals 'clearly with or without merit', the following analyses draw on different samples of appeals. First, we focus on all substantively tried appeals (decided under the ordinary procedure) submitted in 2007. In subsequent parts, we focus on all appeals decided at a particular point in time, independent of the procedure used to decide the case.

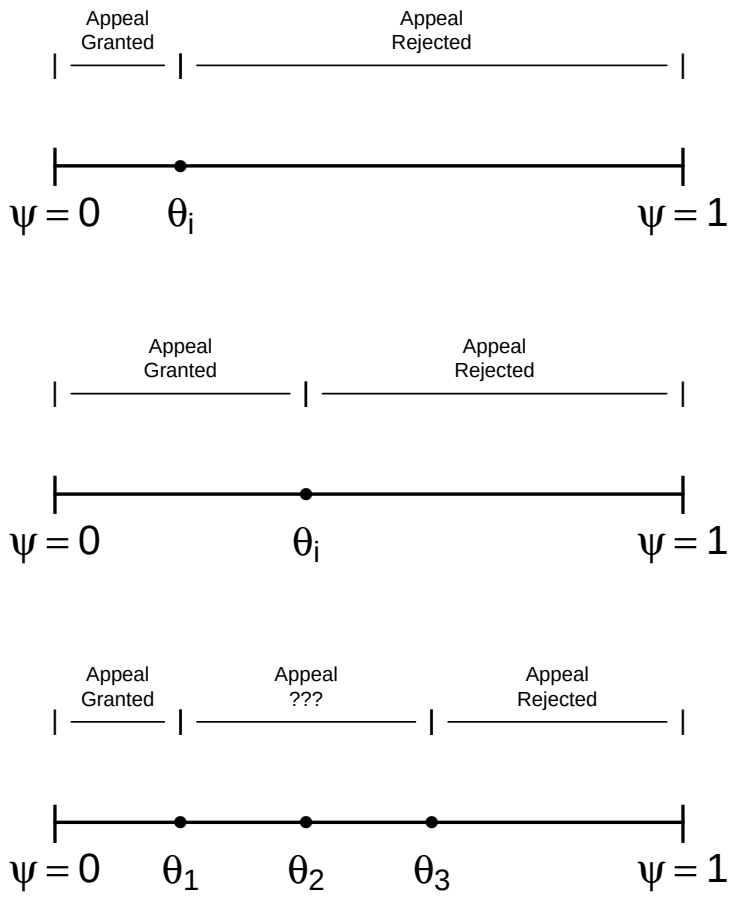
## 1.3 Methodology

### 1.3.1 Estimating Individual Preferences from Panel Decisions Using the Case-Space Model

To estimate individual preferences from the observed aggregate decisions of three-judge panels, we need a framework for modelling preference aggregation. We adopt a 1D case-space model (Kornhauser 1992), which allows us to theoretically describe the preferences of judges and to map different preference aggregation rules onto likelihood estimators. Each case $j$ has *facts* that can be described as a location $\psi_j$. We treat smaller values of $\psi_j$ as indicating stronger appeals (case facts) and larger values of $\psi_j$ as weaker appeals. Each judge $i$ has *preferences* that can be described as a cutpoint $\theta_i$. Each judge, if deciding the case alone, would rule in favor of the appellant if and only if $\psi_j < \theta_i$. Thus, judges with lower cutpoints $\theta_i$ are inclined to grant fewer appeals, and judges with higher cutpoints are inclined to grant more appeals. An assumption of this unidimensional model is that all judges agree on the ranking of relative merits of

appeals and disagree only on the threshold to apply. This has some implications for interpretation, which we discuss below.

**Figure 1.1:** Mapping between Preferences and Decisions




*Note*: The top two axes illustrate the mapping between preferences and hypothetical single-judge decisions. The bottom axis illustrates the three-judge decisions that are actually observed, indicating the range of cases over which decisions depend on which preference aggregation rule most closely matches the court's decision making.

The top two axes of Figure 1.1 show two different hypothetical judges and the decisions they would make if they decided cases alone. However, as described earlier, the cases we are studying are decided jointly by three judges according to the procedures described in the preceding section, and so the resolution of cases in which the three judges disagree (bottom axis of Figure 1.1) depends on

the aggregation rule that combines their preferences into a decision.

Let $i(j)$ be the indices of the judges hearing case $j$, so that $\theta_{i(j)}$ is a three-component vector, with the first element $\theta_{i_1(j)}$ corresponding to the chair, the second $\theta_{i_2(j)}$ to the second judge and the third $\theta_{i_3(j)}$ to the third judge. We consider only those aggregation rules that can be described by a function $f(\theta_{i(j)})$ that maps the preferences of the three judges into an effective preference of the panel.[13] This allows us to define a generic likelihood function for the observable votes:

$$\mathcal{L}(\theta) \;=\; \prod_j p\left(\psi_j < f(\theta_{i(j)})\right)^{y_j} \cdot p\left(\psi_j > f(\theta_{i(j)})\right)^{1-y_j} \tag{1.1}$$

### 1.3.2 Decision-Theoretic Aggregation Rules

We consider a range of decision-theoretic preference aggregation models in our analysis. While other aggregation rules are certainly possible, we believe that our set of rules comprises the most likely candidates—not just for this application, but also for other contexts where the researcher only observes the group's joint decision, not the individual votes.

If we imagine the panel voting by majority rule internally, we expect the median judge, $\theta_{med}$, to determine the outcome. If we imagine the panel voting with a requirement of a unanimity rule to grant an appeal, $\theta_{min}$, i.e., the most restrictive judge, determines the outcome. If instead unanimity is required to reject an appeal, $\theta_{max}$, i.e., the most liberal judge, determines the outcome. Lastly, if the chair's preferences dictates the outcome, we would expect $\theta_{1(j)}$ to be decisive.

We fit models corresponding to these, as well as three additional and less plausible aggregation functions, in our empirical analysis. In addition to a null model that serves as a baseline, we also specify an aggregation rule where the second, $\theta_{2(j)}$, and third judge, $\theta_{3(j)}$, respectively, dictate the outcome. We do not expect these last two aggregation rules to fit the data well but include them as plausi-

13 It is difficult to make a substantive argument for the kinds of non-monotonic preference aggregation functions that could not be described as a mapping of the three judges' preferences into a single effective preference on the same scale.

bility tests. Table 1.1 provides an overview of the different simple aggregation rules:

**Table 1.1:** Overview Decision-Theoretic Rules

| Notation | Aggregation Rule |
|---|---|
| $\theta_{min}$ | Most conservative judge decides |
| $\theta_{max}$ | Most liberal judge decides |
| $\theta_{med}$ | Median judge decides |
| $\theta_{1(j)}$ | Chair judge decides |
| $\theta_{2(j)}$ | Second judge decides |
| $\theta_{3(j)}$ | Third judge decides |

*Note:* This table displays the decision-theoretic rules used to aggregate individual preferences of panel members.

Note that for three-judge panels, we cannot point identify, but only bound, the preferences of certain judges under certain models. For example, if we assume the median judge's preference determines the outcome, we cannot point identify the preferences of either the judge with the lowest or the highest threshold for asylum appeal cases. Similarly, for the minimum and maximum models, we cannot identify the two highest and the two lowest preferences, respectively. However, we can identify which judges these are and bound their $\theta$ with the next most extreme judge's position. Because the preferences of the judges are estimated conditional on the aggregation rule and the fit of the model depends on the predictive performance of the preferences and the aggregation rule jointly, our preference estimates do depend on the aggregation rule we assume. For this reason, we test a variety of models, compare their statistical fit and try to focus on those empirical relationships that are robust to reasonable choices of aggregation rule.

In that spirit, we also consider a mixture model of two of the simple aggregation rules. We do so because the mixture model might better reflect the sequentiality of decision making and the constraints that judges are facing than either of the simple aggregation rules alone. As noted above, the chair of the panel initially receives the case files, reviews them and sets out a draft decision. Then, the second and third judges get the opportunity to review the file and the draft decision in turn, and only if there are unresolvable disagreements after another

round of circulation (and a potential discussion) is a decision by majority rule taken. This is clearly a costly process in terms of time and effort for all judges involved. Yet, whereas the chair judge gets to frame the decision and has to invest time and effort to draft it, there is an incentive for the second and third judges to follow the chair's draft decision, rather than engaging in the effort necessary to determine if they disagree, let alone formulating an alternative to the chair's provisional decision.

One way of thinking about the incentives set up by this process is to consider the cost in terms of time and effort to determine the case facts $\psi_j$ that each judge has to pay. Because the chair judge must pay the cost in any case, but the second and third judges do not, we can expect that some decisions taken by the chair may be at odds with those of the median judge, but the other two judges do not know that, if they do not pay the cost of review.

More precisely, we assume that the review costs are sufficiently high such that for some cases for which the second or third is the median judge, they cannot afford to learn $\psi_j$, but are also not so exceedingly high that they would never learn $\psi_j$. Under these assumptions, there are some cases where the chair is sufficiently close, but not identical, to the median judge, such that the second and third will not pay the review costs. For those cases, the chair will dictate the outcome. In all other cases, the median judge decides the outcome.

While we abstain from formulating (or estimating) a complete game-theoretic model here, we note that this simple sketch of how the sequence of decision making coupled with review costs affects the judges' behavior is sufficient to highlight an important dynamic. This dynamic enables the first judge to more strongly influence the outcome of some but not all cases, with the fraction of cases dictated by the chair increasing in the review costs.

To translate the essence of this idea into a statistical model, we estimate a mixture model of the chair and median aggregation rules.[14] Let $\lambda_{1(j)}$ and $\lambda_{med}$ be the probability of the chair and the median judge deciding the case, respectively,

14 We also tested other mixture models, for example between the median and second judge, but all of these fitted, as expected, significantly worse.

such that $\lambda_{med} = 1 - \lambda_{1(j)}$. The corresponding mixture of aggregation functions

$$f(\theta_{i(j)}) = \lambda_{1(j)} f(\theta_{1(j)}) + (1 - \lambda_{1(j)}) f(\theta_{med}) \tag{1.2}$$

is then plugged into the likelihood function (Equation 1.1) above. Since the likelihood function of this mixture model is by definition more complex than the simple aggregation rules and the risk of exploring only local maxima is correspondingly higher, we resort to Bayesian Markov chain Monte Carlo (MCMC) sampling, rather than maximum likelihood estimation (MLE), for estimation.

### 1.3.3 Measuring the Consistency of Decision Making

Given the case-space model, we can also calculate the extent to which random assignment of judges leads to inconsistency in the decisions that the court makes. Let $\tilde{\theta}_j$ be the consensus of the court, let $f(\psi)$ be the distribution of case facts and let $\theta_j$ be the effective preferences of the judges hearing case $j$. Then, on average, the fraction of cases decided differently than how they would if the consensus were consistently applied is

$$\mathcal{E} = \frac{1}{M} \sum_{j=1}^{M} \left| \int_{\theta_j}^{\tilde{\theta}} f(\psi) d\psi \right| \tag{1.3}$$

To compute this quantity, we need a benchmark for what decisions an entirely consistent court ought to make. We use the expected grant rate conditional on covariates $C_j$, such as language or country of origin, but *excluding* the information which judges heard the case. We then take the mean absolute difference between the predicted probabilities of granted appeals for each judge, $\hat{\pi}_j$, and this benchmark to estimate the inconsistency rate:

$$\mathcal{E} = \frac{1}{M} \sum_{j=1}^{M} |\hat{\pi}_j - E\left[\pi | C_j\right]| \tag{1.4}$$

In analyses that do condition on covariates $C_j$, $E\left[\pi | C_j\right]$ reduces to the mean appeal grant rate over all cases, and the inconsistency rate reduces to the mean absolute error of the fitted values. This offers some intuition into why this

measure captures inconsistency. If the set of judges hearing the case does not matter, then the fitted values, i.e., the predicted probabilities of granted appeals, given the identities of the judges should not vary at all. To the extent they do, this indicates that the judges matter and cases are being decided differently depending on which judges hear those cases. This measure $\mathcal{E}$ assumes again that judges only disagree about thresholds, not the relative merits of cases, but that means that $\mathcal{E}$ provides a lower bound on the court's inconsistency. If judges also disagree about merits, the true inconsistency of the court will be higher than what our estimate of $\mathcal{E}$ suggests.

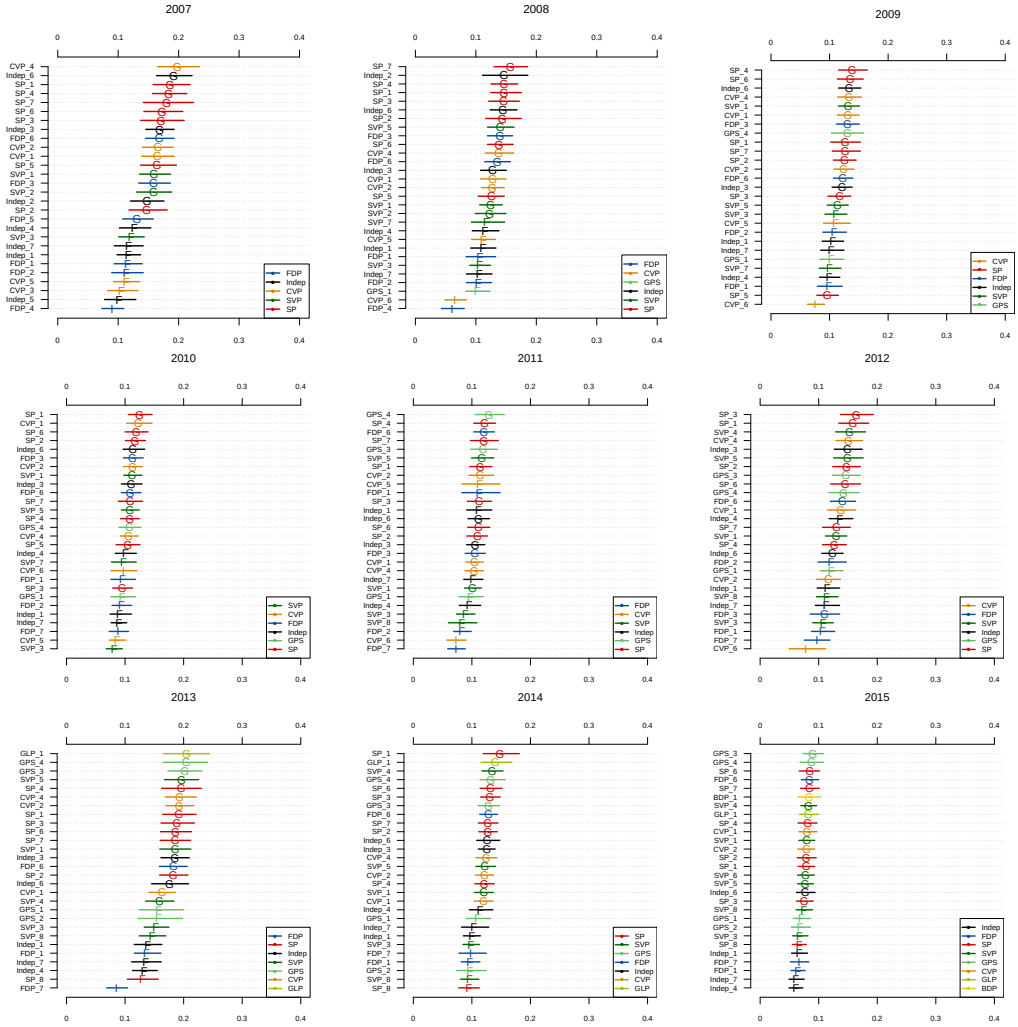
### 1.3.4 Case Facts Varying by Judges, Case Language and Country of Origin

In the previous section, we discussed how the automated case assignment takes the language of the appeal and the language skills of the judges into account. This feature of the assignment has implications for our statistical analysis. For example, French-speaking asylum seekers from Côte d'Ivoire, with typically low asylum grant rates, might be likely to submit their asylum application in French-speaking Switzerland (rather than the German-speaking part), which in turn determines the language of both the asylum decision and the appeal. If this is indeed the case, we would worry that the judges operating in the different official Swiss languages (French, German and Italian) face cases from different origin countries and therefore of different case strength. In order to account for this possibility, we include the language of a case as a covariate for predicting the strength of the case $\psi_j$, since cases are only assigned to judges as-good-as randomly conditional on case language.

To fully understand the constraints imposed on the random allocation of cases to judges, we conducted extensive background research and interviews with the general secretariat of the FAC and the software company that was hired to write the randomization code for the Bandlimat. All parties involved assured us, that conditional on language and the time when an appeal is submitted, cases are indeed randomly assigned to judges. Yet, when we conducted our own placebo tests and regressed the appellant's country of origin on a series of judge fixed effects (and the language of the case), the results, displayed in Figures 1.8 and 1.9 in the Appendix, show that the distribution of $p$-values from these joint $F$-tests

deviate from the uniform distribution we would expect if cases were indeed (conditionally) randomized. While we note that some of the strongest imbalance comes from countries with few cases, this is nonetheless a concern when we aim to attribute differences in grant rates to differences in judges' ideology. If, for example, restrictive judges could somehow influence the allocation such that they only see weak cases with high $\psi_j$, we would overestimate the heterogeneity in preferences and their correlation with judges' party membership.

**Figure 1.2:** Distribution of Expected Case Strength




*Note*: Each graph shows the average case strength $\psi_j$ based on the appellant's country of origin and year of appeal submission for each judge who was on the court in a given year and decided at least 20 cases. Since cases are allocated based on case language and judges' language ability, we note each judge's main language (G for German, F for French, I for Italian).

Figure 1.2 shows that the latter is unlikely to be a major concern. For this test,

we predict the case strength $\psi_j$ based on the appellant's country of origin and year of appeal submission. We find that the average strength of cases allocated to judges is very similar across parties and that there is no indication that judges from center-right to right-wing parties (Free Democratic Party and Swiss People's Party) are allocated weaker cases than judges from left-wing (Social Democrats and Greens) or centrist parties (Christian Democrats). Hence, we believe that the small imbalance remaining after adjusting for the language of the appeal is unlikely to impact our analysis.

In the second part of the analysis, we explore changes in judges' behaviour for the years 2007–2015. In order to adjust these dynamic estimates for changes in case composition and strength over time, we control for country of origin of the appellant instead of the language of the case. We expect that controlling for country of origin adjusts for a sizeable part of the unobserved variation in case strength, and, at the same time, blocks any confounding introduced by the non-random assignment of judges by language.

## 1.4 Data: Sample, Outcome Measure and Covariates

We obtained the data that form the basis of our analysis directly from the FAC, which is obliged by Swiss law to inform the public about its jurisdiction.[15] The key dependent variable measures the outcome of the verdict. While the FAC employs a relatively fine-grained measure of full and partial granting of appeals, we collapse this information into a binary measure, where an appeal is coded as 'granted' if the verdict potentially leads to an improvement of the appellant's situation (independent of the appeal being fully or only partly granted) and 'rejected' otherwise.

In addition to the outcome measure, the data obtained from the FAC contains the following information that we leverage in our analysis: the unique case id, date of submission, date of decision, the panel composition and the role of the judges, the language of the appeal and the appellant's country of origin. For the subset of published decisions, this information is also available on the court's online

15 Art. 29, par. 1 ACA.

database.[16]. Where possible, we cross-checked the two data sources to make sure we obtained the complete set of cases. We complement this database with personal information about the judges, most importantly their party membership (or support), which we compiled from judges' CVs on the official website of the FAC.[17] As part of the data-sharing agreement reached with the FAC, we agreed to abstain from revealing the judges' names. In the following, we replace the name of each judge with a unique ID and an indicator of her political affiliation.[18]

Overall, the dataset contains the universe of all 40,506 unique decisions made by a total of 38 judges between January 1, 2007, and December 31, 2015.[19] Of the full set of cases, we dropped 13.5% that were either 'written off' or received 'another' decision that can be considered neither as in favor nor against the appellant. Employing our binary measure, Table 1.2 shows for the 35,033 appeals that remain in our sample, 14% of appeals are granted, and 86% are rejected. As previously discussed, the language of the case is likely correlated with the appellant's country of origin and might also be one of the drivers for the differences in acceptance rates across language.

**Table 1.2:** Descriptive Statistics

| Subset | Cases | Acceptance Rate |
|---|---|---|
| All | 35,033 | 13.9% |
| German | 22,095 | 15.5% |
| French | 10,988 | 12.2% |
| Italian | 1,950 | 5.5% |

*Note:* Descriptive statistics for all cases with a binary outcome, subsetted by language of the verdict, decided between January 1, 2007 and December 31, 2015.

16 See http://www.bvger.ch/publiws/pub/search.jsf.

17 See https://www.bvger.ch/bvger/en/home/about-fac/judges-and-court-clerks/judges.html for short bios of the active judges.

18 We, the researchers, as well as the FAC, are well aware that this partial anonymization is incomplete at best, and that it would be fairly straightforward to figure out the identity of the judges using publicly available information. We do believe, however, that some level of anonymization is helpful in focusing the discussion of our findings on structural issues of the court, rather than on the behavior of individual judges.

19 If several appeals were unified and received a joint decision, we recorded it as one and not several observations (this concerns 451 decisions).

The following analysis proceeds in two parts. First, we test different aggregation rules on substantively tried cases submitted in the first year of the court's existence, as only those were always decided with three-judge panels.[20] Since some judges employed the simplified procedure even for cases submitted toward the end of 2007 but decided in 2008, we narrow the database to cases *submitted* during the first three quarters (January 1st to September 30th) of 2007 to ensure a consistent composition of cases. In the second part, we follow the dynamics of judges' preferences and the court's consistency over the years 2007–2015. For this year-by-year analysis, we focus on the year of the *decision* of the appeal to increase the comparability of cases over time. Because of the difference in how we code the submission or decision year of an appeal, the preference and inconsistency rate estimated for 2007 will likely differ between the first and second part.

## 1.5 Results

### 1.5.1 Which Aggregation Rule Fits Panel Decisions Best?

In order to understand how individual preferences are aggregated into a joint panel decision, we focus on substantively tried cases submitted during the first three quarters of 2007, which were all decided by panels of three. We begin by fitting a series of models to these data using the simple aggregation rules described in more detail in the previous section: preference of the most restrictive judge (min), median preference, preference of the most liberal judge (max), chair's preference, second judge's preference, third judge's preference and the null model. As explained above, the last three of these rules are intended as plausibility tests, and we do not expect them to fit well. Therefore, they provide us a check that our estimation approach has power against implausible alternatives. All of these models have one degree of freedom per judge, except for the null model, which only fits a constant.

20 Note that the cases that do not fulfill the formal requirements are dismissed 'without entering into the substance of the case' by the chair judge in a single-judge procedure. Since these cases are decided by single judges and not panels of judges, they are excluded from this part of the analysis, where we focus exclusively on substantively tried cases.

**Table 1.3:** Table of Fit Statistics for MLE Estimates (2007)

| | LL | df | AIC |
|---|---|---|---|
| Chair | -581.4 | 28 | 1218.9 |
| Median | -585.7 | 28 | 1227.3 |
| Max | -587.8 | 28 | 1231.5 |
| Min | -598.5 | 28 | 1253.0 |
| Null | -636.3 | 1 | 1274.7 |
| Second | -609.4 | 28 | 1274.8 |
| Third | -620.6 | 28 | 1297.1 |

*Note:* Table of fit statistics for MLE estimates of judges' preferences in 2007 under different aggregation rules, sorted by AIC. LL = log likelihood; df = degrees of freedom; AIC = Akaike Information Criterion.

As Table 1.3 indicates, the best-fitting simple aggregation rule is the chair judge, followed by the median model. The difference in the log likelihood between these two non-nested models with the same number of parameters is 4.3, indicating that the chair model clearly outperforms the median model. All of the other models fit worse than these two, with the second and third judge model even ranked below the null model, according to the Akaike Information Criterion (AIC).

That the best-fitting model posits that the chair judge decides as dictator is a theoretically compelling result, given the structure of the decision procedure followed by the court. Because the chair sees the case first and writes the initial draft of the decision, she has an opportunity to frame the decision, while the second and third judges have an incentive to not investigate the case as thoroughly as they would if they were the chair. However, the results also indicate that the preferences of the second and third judge matter to some extent. If the other judges exerted no constraint on the chair, we would expect an even larger difference between the chair and the median model in terms of log likelihood and AIC.

To more explicitly investigate the trade-off, faced by second and third judge between paying the cost for review and letting the chair decide, we turn to the results from the mixture model. As discussed earlier, the mixture model

is by construction more demanding to estimate than the simple aggregation rules. Because the maximum likelihood estimates have proven to be somewhat dependent on the starting values in our test runs, indicating that we might only find local, not global maxima, we now turn to MCMC sampling, which is better suited to explore the entire posterior density.

Making full use of the advantages of Bayesian methods, we run a series of models with different prior specifications. We first estimate a mixture model with flat priors and no covariates so that we can compare the model fit to the MLE estimates. For the second model—our preferred specification—we add hierarchical random effects priors for each judge. In order to facilitate a qualitative comparison of model fit between the mixture models and the best-fitting simpler aggregation rule, we also estimate the corresponding Bayesian variants for the chair and median models. The comparison between the Bayesian mixture and chair or median model is facilitated by the fact that the chair model is a special case of the mixture for which $\lambda_{chair} = 1$, and the median model with $\lambda_{chair} = 0$, respectively.

**Table 1.4:** Table of Fit Statistics for Bayesian Estimates (2007)

| Model | Priors | df | $\lambda_{chair}$ | DIC |
|---|---|---|---|---|
| Mixture | flat | 29 | 0.34 | 1185.8 |
| Mixture | hierarchical | 29 | 0.43 | 1186.3 |
| Chair | flat | 28 | 1.00 | 1216.1 |
| Chair | hierarchical | 28 | 1.00 | 1218.3 |
| Median | flat | 28 | 0.00 | 1219.7 |
| Median | hierarchical | 28 | 0.00 | 1221.4 |

*Note:* Table of fit statistics for Bayesian estimates of judges' preferences in 2007 under the mixture, chair and median models.

Table 1.4 summarizes the models, sorted by the DIC, a hierarchical model generalization of the AIC. The considerable difference in DIC suggests that even when penalizing for higher model complexity, a mixture of the chair and judge models outperforms an aggregation rule in which the chair acts as dictator or all cases are decided by the median judge, and that this result also holds up with random effect priors.

The estimated mixing parameter $\lambda_{chair}$ varies slightly across models, with values ranging between 0.34 and 0.43. This indicates that even though a majority of verdicts in 2007 reflect the preferences of the median judge, a significant minority of up 43% is decided by the chair alone. If we add to these 43% the approximately 19% (= 57%/3) of cases in which the chair judge happens to be the median, we see that the chair effectively decides the majority of cases. It is therefore not surprising that among the simple aggregation rules, the chair, and not the median model, exhibits the slightly better model fit.

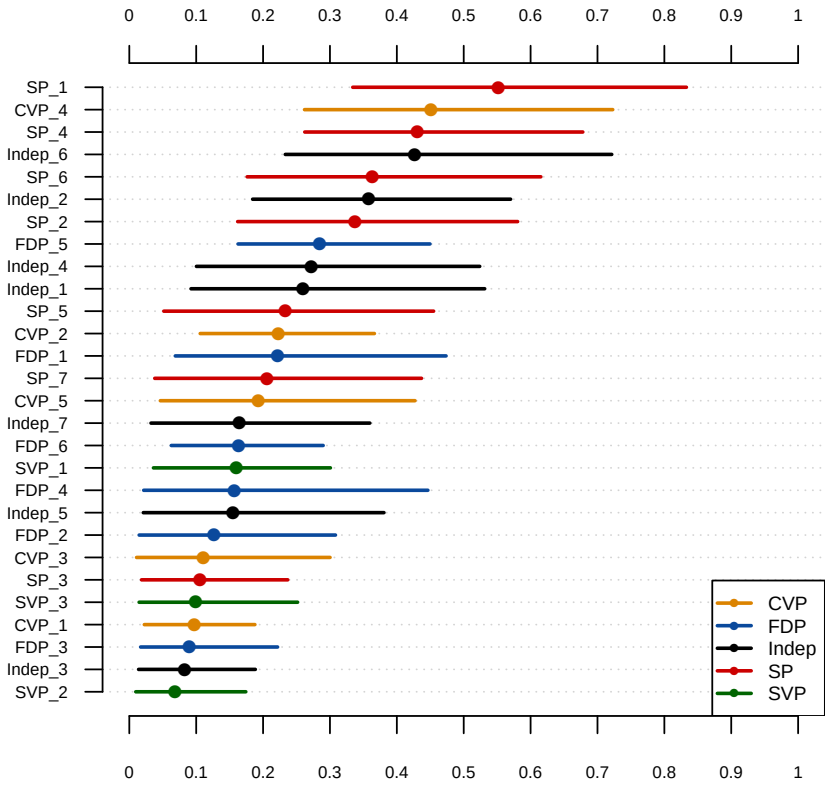
### 1.5.2 Heterogeneity in the Preferences of Judges and Inconsistency of the Court

Based on the best-fitting models, this section explores the heterogeneity in judges' grant rates in 2007 and how they lead to inconsistent decision making at the court. Figure 1.3 shows the estimated preferences of the judges under our preferred specification, the mixture of chair and median models that controls for language and uses hierarchical priors on the judges. Table 1.5 in the Appendix shows the underlying numerical estimates.

Figure 1.3 reveals two striking features. First, there is substantial heterogeneity in the preferences of judges, both within and across parties. Second, there is a clear association in the expected direction between the preferences of judges and their political affiliation. Judges affiliated with the Social Democratic Party (SP) are, on average, among the most favorable toward asylum seekers. Non-partisan judges and those affiliated with the centrist Christian Democracts (CVP) exhibit the most intra-party variance, but both groups are on average close to the court's median. Judges affiliated with the center-right Free Democratic Party (FDP) are, on average, the second most restrictive, while judges affiliated with the right-wing Swiss People's Party (SVP) are the least favorable toward asylum seekers. Thus, judges' estimated preferences are entirely consistent with their parties' general stances on asylum and immigration issues.[21]

21 See Figure 3.9 in the Appendix of Chapter B 3 for an illustration of parties' stances on asylum and immigration policy.

**Figure 1.3:** Judges' Preferences (2007), Mixture Model



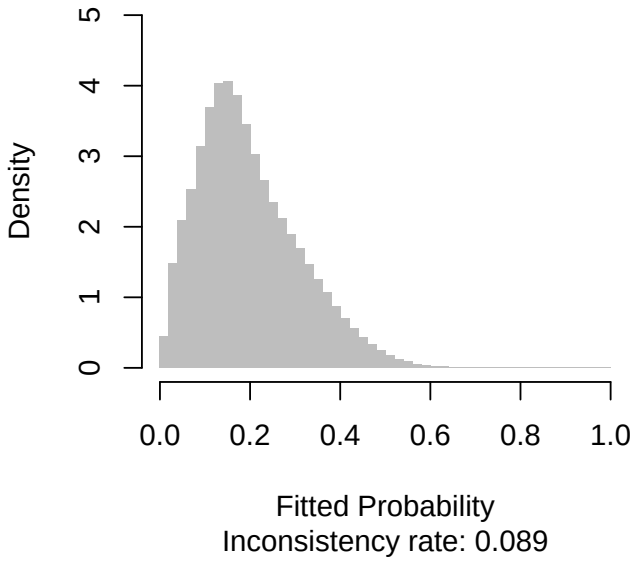

*Note*: The estimated preferences of the judges in 2007, under the mixture of chair and median models. Mixture probability $\lambda_{chair} = .43$. Posterior means alongside with 95% credible intervals. Full party names: Christian Democrats (CVP); Free Democratic Party (FDP); non-partisan (Indep); Social Democrats (SP); Swiss People's Party (SVP).

The most liberal judge (SP, 0.55) had, in cases that s/he could decide alone, a grant rate that is 7.9 times higher than the most restrictive judge (SVP, 0.07). More generally, the differences in preference estimates for the five most liberal and restrictive judges are substantively large and estimated with sufficient precision to be statistically meaningful. Tables 1.6 and 1.7 in the Appendix show the corresponding preference estimates from the Bayesian chair and median model, respectively. While there are some differences with regard to the point estimates for the preferences and the implied ordering of judges from liberal to restrictive, the general findings of a substantial variation in preferences, and their association with party membership, are also evident in those simpler models. In sum,

we find across a variety of models that the political ideology of judges, proxied by their party affiliation, is a robust predictor of their preferred grant rate.

What does this heterogeneity in the preferences of the judges imply for the consistency with which the court applies the law? To answer this question, we predict the probability of a successful appeal for each composition of judicial panels, as observed in 2007, and based on the preference estimates from the main mixture model. If panel composition had no effect on the success of appeals, we would predict a constant probability for all cases.

**Figure 1.4:** Predicted Probability of Successful Appeal




*Note*: This graph shows the predicted probability of successful appeal for each case under the mixture model, given the empirical compositions of the judicial panels of cases submitted during the first three quarters of 2007.

Figure 1.4 shows that this is clearly not the case. By contrast, we find considerable variation in the predicted probabilities solely due to different judges serving on panels. Overall, this heterogeneity in adjudication results in an inconsistency rate of 8.9%, indicating that one in eleven cases is decided differently than how it would be if the court's consensus were consistently applied. Figure 1.10 in the

Appendix shows very similar distributions of predicted success and inconsistency rates of 8.4% and 8.3% for the Bayesian chair and median models, respectively.

### 1.5.3 Does the Court Become More Consistent Over Time?

Several questions emerge from the substantial preference variation reported in the previous section concerns the possible convergence of these preferences over time: is the inconsistency rate observed in 2007 merely an artifact of the first year of the court's existence and do judges' preferences converge over the following years? Or is the substantial variation in preferences and their correlation with judges' ideology rather a permanent feature of a politicized court whose judges are affiliated with political parties and voted into office by the parliament?

In order to answer these questions, we leverage the universe of all unique asylum appeal decisions between 2007 and 2015.[22] As discussed earlier, on January 1, 2008, the court introduced the simplified decision procedure that has since allowed the chair judge to avoid three-judge panels for appeals that she deems, with the approval of the second judge, 'clearly with or without merit'. Among other things, this means that we do not observe the identity of the third judge for this highly selective subset of cases over the entire study period.[23] Methodologically, the non-observance of the third judge is an issue if the chair's classification of cases clearly with(out) merit also depends on the preferences of the third judge. For example, a restrictive judge might be more likely to rule that an appeal is clearly without merit if the third judge is liberal, and thereby avoid the more complex procedure of determining the case's merits in a full panel, and running the risk of having to grant it against her preferences.

We see two principled ways to deal with those cases for which the third judge is not observed. First, we can impute the missing third judge with the court's average preferences (computed without the preferences of the chair and second

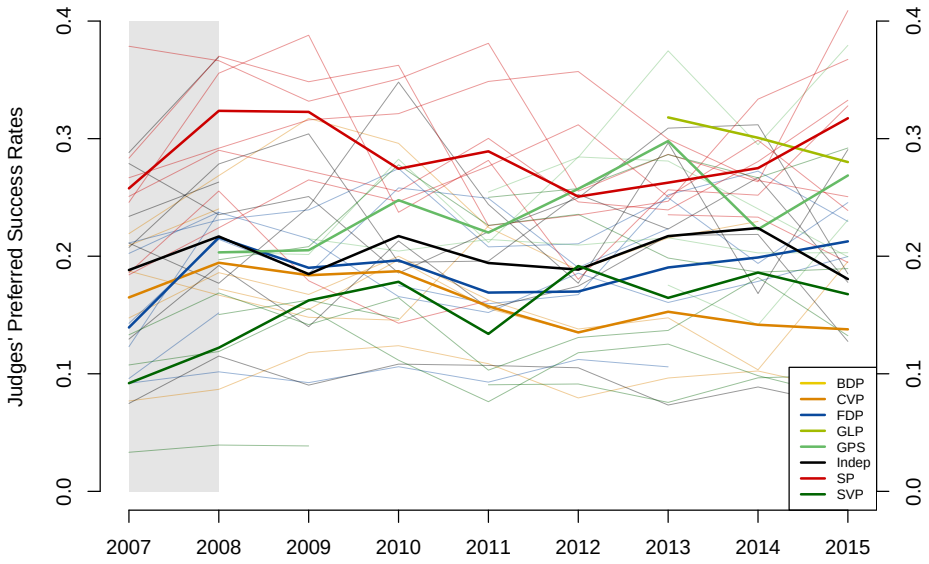
22 December 31, 2015 is the end point of our study period because the FAC changed again its decision-making procedure, making comparisons over time more difficult.

23 We actually do observe the third judge even for cases decided under the simplified procedure or the single-judge procedure since January 1, 2011, when the FAC implemented new software that saves the initial assignment of all three judges, independently of whether or not they were actually involved in the final decision.

judge serving on the particular case) and then apply the Bayesian mixture model. The imputed average is a consistent estimator of the preference of the unobserved third judge and will therefore not bias the estimates for the other judges. We expect, however, that this procedure would lead to an underestimation of the weight of the median model (relative to the chair model), since the preferences of the actual third judge will typically be further away from the median than the imputed mean suggests. The second, and preferred, option is to focus on the second best-fitting Bayesian chair model, for which the identity of the third (or second) judge is by definition not relevant. When comparing the estimates from this model over time, recall that the majority of cases is effectively decided by the chair of the three-judge panel in 2007. Hence, we would not expect a major increase in the inconsistency rate due to the introduction of the simplified procedure in 2008. In addition, the Bayesian chair model allows us to include appeals that were dismissed by a single judge (the chair judge) before entering into the substance of the case.

Another caveat concerns the estimation and interpretation of dynamic preferences across time. While the random assignment of judges to panels (conditional on language) allows us to attribute differences in grant rates to differences in judges' ideology at any given point in time, it does not allow us to causally attribute changes in grant rates of the same judge over time to changes in her ideology, since we cannot rule out that the average strength of asylum appeals also varies. To adjust these dynamic estimates for changes in case composition and strength over time, we control for the appellant's country of origin. We expect that controlling for country of origin blocks any confounding introduced by the non-random assignment of judges by language and also adjusts for some, but not all, of the unobserved variation in case strength. Without further and strong assumptions about constancy of case merits conditional of country of origin, we cannot make absolute comparisons of judges' preferences across years. In effect, this means that we are not able to distinguish the hypothesis that cases become systematically easier (harder) to decide consistently from the hypothesis that the judges converge (diverge) in their behavior. Nonetheless, a flexible model where the preferences of the judges, and the distributions of cases from each country, vary from year to year enables us to determine, without invoking any further assumptions, whether overall consistency improved or worsened over time.

**Figure 1.5:** Year-by-Year Preference Estimate (2007–2015)



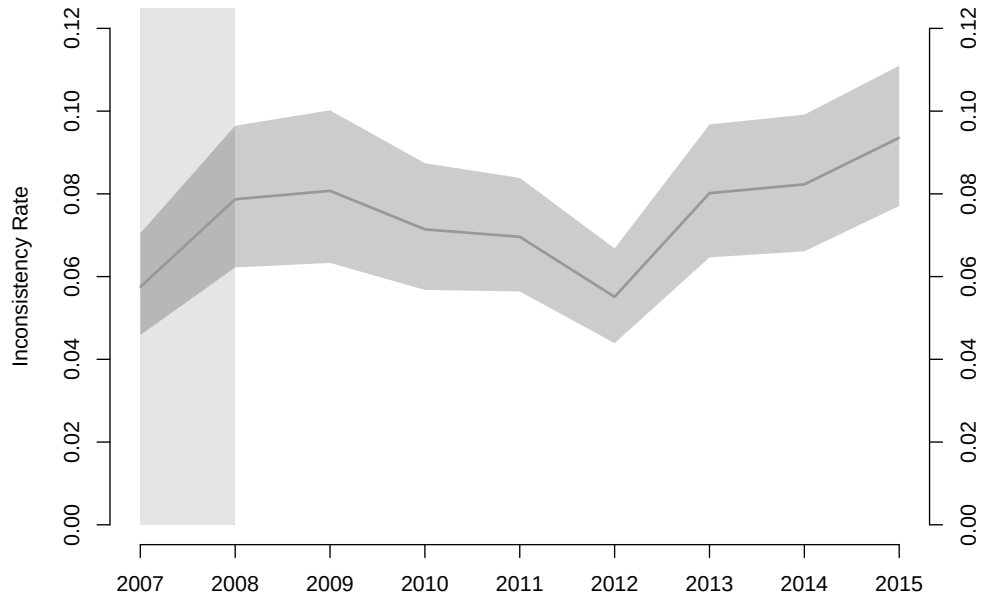

*Note*: Year-by-year preference estimates for all judges serving on the court between 2007 and 2015, with party mean trajectories. Judges' preferences for a given year are estimated based on the cases decided in that year, except for 2007 (shaded in gray), for which only cases submitted and decided in 2007 are used. Full party names: Conservative Democrats (BDP); Christian Democrats (CVP); Free Democratic Party (FDP); Green Liberal Party (GLP); Green Party (GPS); non-partisan (Indep); Social Democrats (SP); Swiss People's Party (SVP).

Figure 1.5 shows the trajectories of the judges' preference estimates over time. While there is some variation in the preferences of judges over time, the overall pattern is very clear: the average success rates of cases chaired by judges from the same party, as well as the differences across parties, are remarkably constant over time. There is one exception, however: the centrist Christian Democrats started out close to the court's average in the first year, but became more restrictive over time, even surpassing the right-wing Swiss People's Party in 2012. In sum, the overall trends in judges' preferred grant rates do not suggest that they converged in more recent years.

Next, we explore the trends in inconsistency rates more explicitly. Since all estimates are based on the chair model, we can directly compare the inconsistency rate of cases decided in 2007 to those in later years. This also means, as discussed, that we would not expect a substantial increase in the court's inconsistency solely due to the introduction of the simplified procedure in 2008, since the

chair already had considerable power to impose her preferences on three-judge panels in 2007.

**Figure 1.6:** Inconsistency Rate over Time




*Note*: The inconsistency rate in a given year is estimated based on the cases decided in that year, except for 2007 (shaded in gray), for which only cases submitted and decided in 2007 are used.

Figure 1.6 shows the trends in inconsistency rates and confirms the pattern apparent in the previous graph. While there is some fluctuation in the inconsistency rate from year to year, ranging from a minimum of 5.5% in 2012 to a maximum of 9.4% in 2015, we find no evidence that the judges preferences converged over time.[24] If anything, the inconsistency rate slightly increased in most recent years, indicating that the issue of preference variation in asylum adjudication on the FAC is by no means confined to the early years of the court's existence, but rather a permanent fixture. The last section explores the legal and political implications of this finding.

24 Note that, as opposed to the inconsistency rate calculated for 2007 above, the estimates here include single-judge dismissals (before entering into the substance of the case).

## 1.6 Conclusion

Several studies of asylum adjudication show considerable variation between decision makers (see, e.g., Fischman 2011; Ramji-Nogales et al. 2007; Rehaag 2007). One limitation faced by existing studies is that researchers typically only have access to anonymized information about the identity of the decision maker, which renders inferences between the estimated preferences and the decision-makers' characteristics, such as ideology, challenging. We overcome this challenge by focusing on asylum appeal decisions of the Swiss FAC, where judges' identity and ideology, proxied by party affiliation, is public knowledge. Our analysis of the universe of all appeals decided between 2007 and 2015 demonstrates that judges' preferences vary substantially with regard to grant rates and that those preferences correlate strongly with judges' political ideology in expected ways.

In particular, we show that similar appellants faced significantly different grant rates, depending on the panel of judges their case was assigned to. Since cases are, conditional on language, randomly assigned to judges, the disparities between judges cannot be explained by differences in case merits. This disparity violates the very essence of article 8(1) of the Swiss Constitution that stipulates that "[e]very person is equal before the law."

Our paper has important implications for several audiences. For the comparative literature on disparities in asylum adjudication, our paper provides some of the most direct evidence to date that judges' political ideology influences their preferences over asylum appeal, even in the context of a high-stakes appeal court of last resort. While there is within-party variation, the disparity between the expected grant rate of judges affiliated with the most liberal and the most restrictive parties, are both statistically significant and substantially relevant. The magnitude of the variation in expected success rates by panel composition, however, is smaller than what has been found in previous studies in the U.S. and Canada (see Fischman 2011; Ramji-Nogales et al. 2007; Rehaag 2007).

Our study also has direct policy implications for the Swiss FAC. Our background research and interviews with members of the court revealed that the court is well aware of, and concerned by, the rumours of sizeable heterogeneity that we quantitatively confirm here. The FAC implemented two institutional features

that are explicitly designed to increase consistency in decision making. If new legal questions arise, five-judge panels issue leading decisions that have *stare decisis*-like implications for subsequent decisions on similar appeals. In addition, judges from different chambers are assigned to serve together on panels in non-urgent cases to facilitate exchange and consistency. While our analysis of the inconsistency rate over time cannot disentangle the success or failure of these two measures, the overall trend gives little reason for optimism: the inconsistency rate fluctuated between 5.5% and 8.1% within the first five years of the court and has increased to 9.4% in most recent years.

If the goal is to minimize the variation in grant rates within the current judicial selection procedure that fosters the dependency of judges on their parties, the FAC would have to look at the design of the decision-making procedure. Abolishing the simplified procedure would likely have only minor effects on the overall inconsistency rate (while significantly increasing the workload), since the structure of the ordinary decision-making procedure already grants considerable power to the chair judge. Based on the findings of this study, we believe that panels are only able to effectively moderate the inconsistencies if judges have to simultaneously review the appeal and independently draft a verdict. While considerably more work than the existing procedure, only such a redesigned decision-making procedure promises to unleash the full power of Condorcet's jury theorem, as applied to groups of judges by Kornhauser and Sager (1986).

Lastly, our study also has broad methodological implications for models concerned with inferring individual preferences from group decisions. We show that in a context where decision makers are repeatedly and randomly allocated to groups, our framework can recover both individual preferences from group decisions without observing individual votes and the aggregation rule (or mixture of aggregation rules) that best fits the decision-making process. We expect that this framework can also be fruitfully applied in a variety of other contexts of repeated group interactions, where joint decisions or performance indicators without any information on individual votes or contributions are the norm. Beyond judicial behavior, particularly promising examples for future applications are inferring the preferences of hiring committee members that repeatedly interview large numbers of candidates and students' ability from group projects with rotating group membership.

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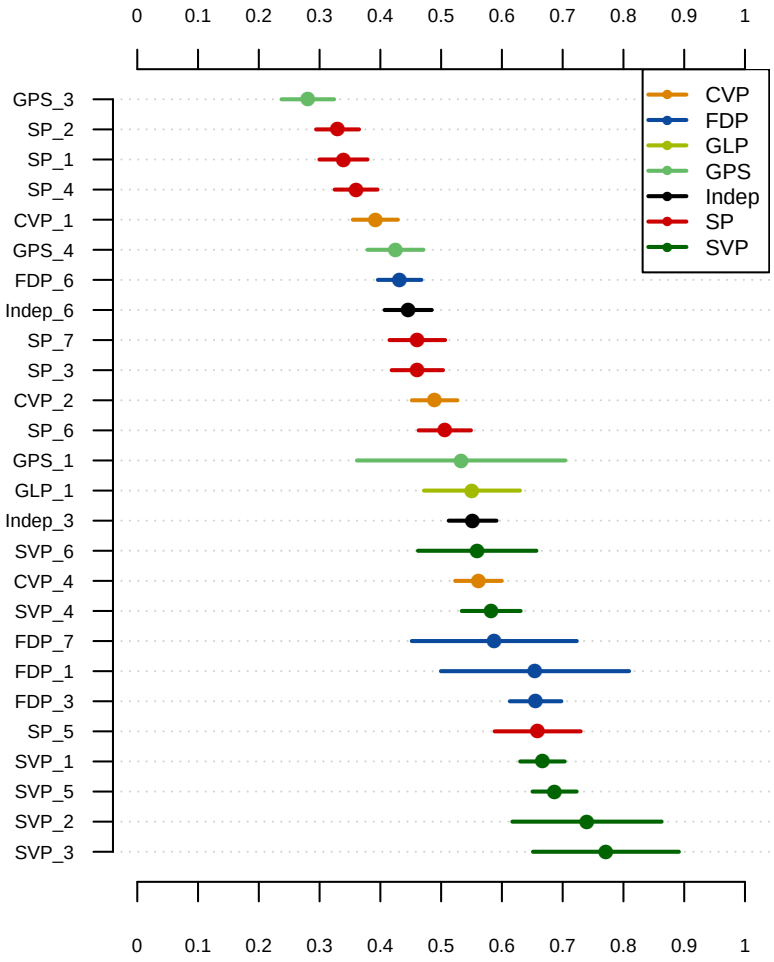
# Appendix

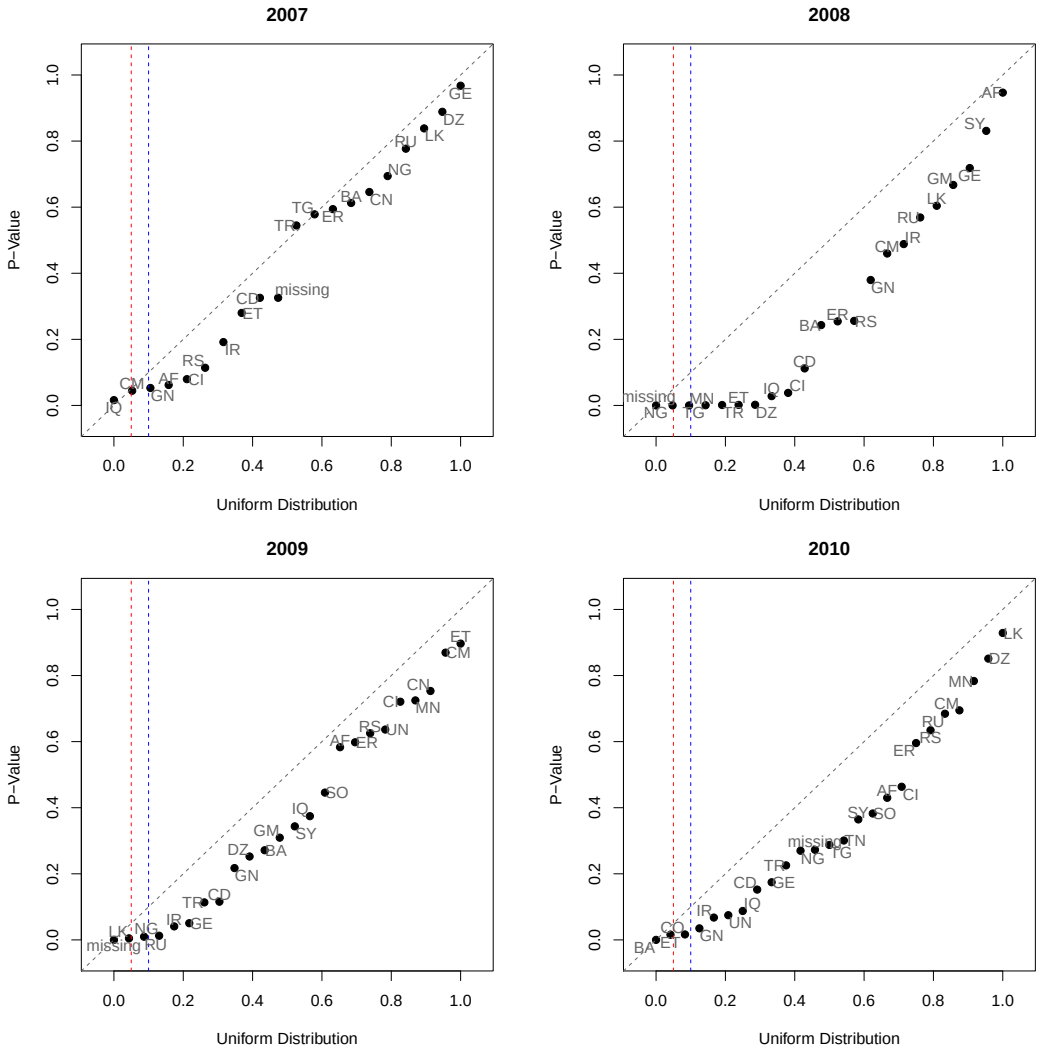
## 1.A Additional Figures

**Figure 1.7:** Probability of Deciding Case by Simplified Procedure



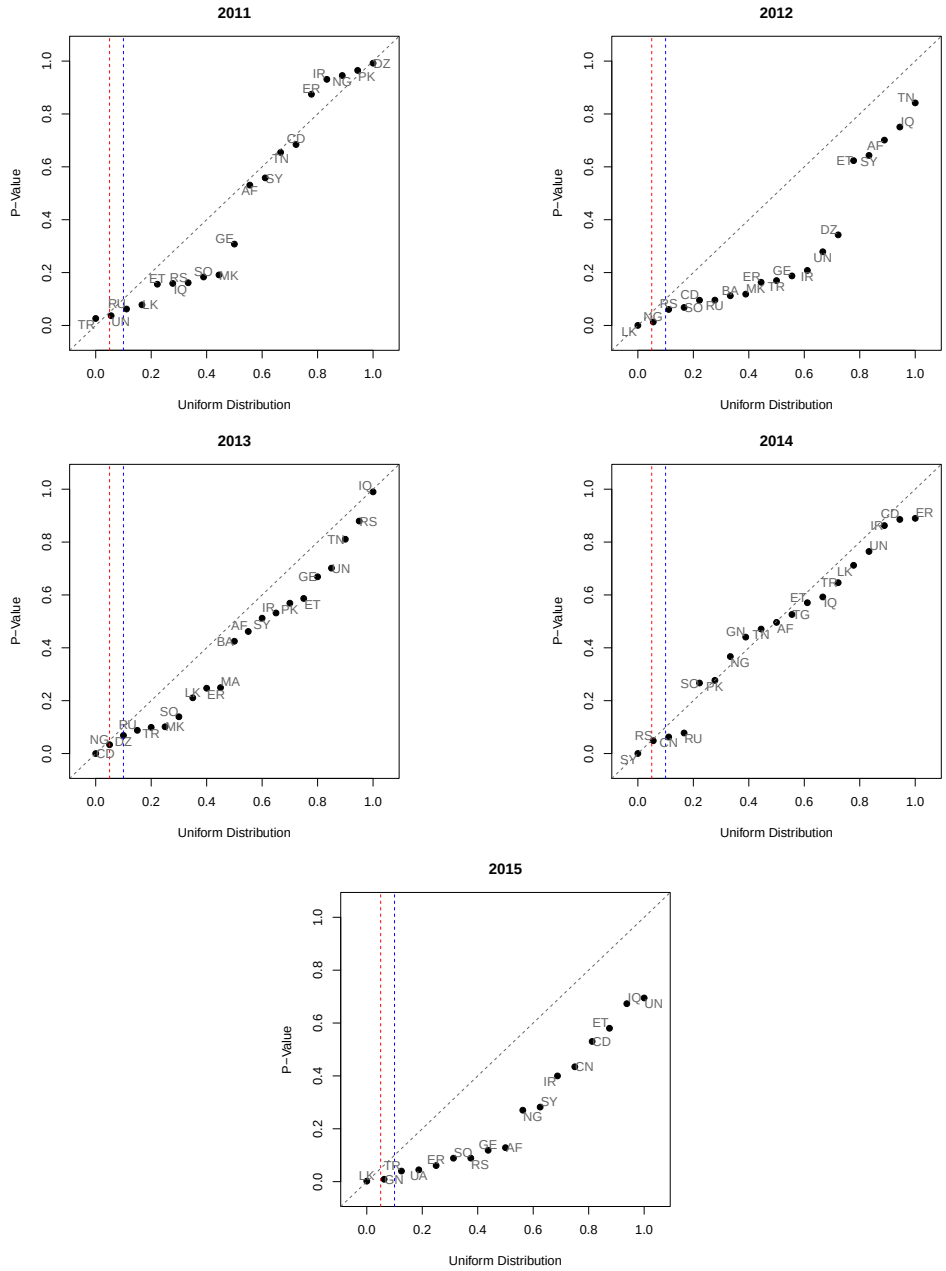

*Note*: The graph displays the probability that a chair judge handles a case under the simplified procedure as opposed to the ordinary procedure. It includes judges that chaired at least 50 substantively tried cases between 2008 and 2015. Full party names: Christian Democrats (CVP); Free Democratic Party (FDP); Green Liberal Party (GLP); Green Party (GPS); non-partisan (Indep); Social Democrats (SP); Swiss People's Party (SVP).

**Figure 1.8:** Distribution of $P$-Values from $F$-Tests (2007–2010)




*Note*: All graphs show distributions of $p$-values from joint $F$-Tests of regressions of the appellant's country of origin on chair judge-fixed effects (and case language). If covariates were indeed (conditionally) randomized, $p$-values would follow the diagonal line. Countries of origin with fewer than 50 submitted appeals in a given year are omitted.

**Figure 1.9:** Distribution of $P$-Values from $F$-Tests (2011–2015)




*Note*: All graphs show distributions of $p$-values from joint $F$-Tests of regressions of the appellant's country of origin on chair judge-fixed effects (and case language). If covariates were indeed (conditionally) randomized, $p$-values would follow the diagonal line. Countries of origin with fewer than 50 submitted appeals in a given year are omitted.

**Table 1.5:** Judges' Preference Estimates, Mixture Model (2007)

| Judge | Point Estimate | 2.5% | 97.5% |
|---|---|---|---|
| SP_1 | 0.55 | 0.33 | 0.83 |
| CVP_4 | 0.45 | 0.26 | 0.72 |
| SP_4 | 0.43 | 0.26 | 0.68 |
| Indep_6 | 0.43 | 0.23 | 0.72 |
| SP_6 | 0.36 | 0.18 | 0.62 |
| Indep_2 | 0.36 | 0.18 | 0.57 |
| SP_2 | 0.34 | 0.16 | 0.58 |
| FDP_5 | 0.28 | 0.16 | 0.45 |
| Indep_4 | 0.27 | 0.10 | 0.52 |
| Indep_1 | 0.26 | 0.09 | 0.53 |
| SP_5 | 0.23 | 0.05 | 0.46 |
| CVP_2 | 0.22 | 0.11 | 0.37 |
| FDP_1 | 0.22 | 0.07 | 0.47 |
| SP_7 | 0.21 | 0.04 | 0.44 |
| CVP_5 | 0.19 | 0.05 | 0.43 |
| Indep_7 | 0.16 | 0.03 | 0.36 |
| FDP_6 | 0.16 | 0.06 | 0.29 |
| SVP_1 | 0.16 | 0.04 | 0.30 |
| FDP_4 | 0.16 | 0.02 | 0.45 |
| Indep_5 | 0.15 | 0.02 | 0.38 |
| FDP_2 | 0.13 | 0.01 | 0.31 |
| CVP_3 | 0.11 | 0.01 | 0.30 |
| SP_3 | 0.11 | 0.02 | 0.24 |
| SVP_3 | 0.10 | 0.01 | 0.25 |
| CVP_1 | 0.10 | 0.02 | 0.19 |
| FDP_3 | 0.09 | 0.02 | 0.22 |
| Indep_3 | 0.08 | 0.01 | 0.19 |
| SVP_2 | 0.07 | 0.01 | 0.17 |

*Note*: This table presents estimates for judges' individual preferences based on the mixture of chair and median models that controls for case language and uses hierarchical priors on the judges.

**Table 1.6:** Judges' Preference Estimates, Chair Model (2007)

| Judge | Point Estimate | 2.5% | 97.5% |
|---|---|---|---|
| SP_1 | 0.41 | 0.28 | 0.55 |
| CVP_4 | 0.36 | 0.26 | 0.48 |
| Indep_6 | 0.34 | 0.24 | 0.45 |
| SP_4 | 0.32 | 0.22 | 0.44 |
| Indep_2 | 0.29 | 0.18 | 0.42 |
| Indep_4 | 0.29 | 0.15 | 0.47 |
| Indep_1 | 0.28 | 0.14 | 0.46 |
| FDP_1 | 0.28 | 0.13 | 0.47 |
| FDP_5 | 0.26 | 0.17 | 0.37 |
| SP_6 | 0.26 | 0.15 | 0.40 |
| SP_2 | 0.25 | 0.13 | 0.39 |
| CVP_5 | 0.24 | 0.11 | 0.40 |
| Indep_5 | 0.23 | 0.10 | 0.40 |
| CVP_2 | 0.22 | 0.13 | 0.32 |
| SP_7 | 0.22 | 0.10 | 0.37 |
| Indep_7 | 0.21 | 0.10 | 0.37 |
| FDP_6 | 0.21 | 0.13 | 0.31 |
| SVP_1 | 0.21 | 0.12 | 0.32 |
| CVP_3 | 0.20 | 0.07 | 0.38 |
| SP_5 | 0.19 | 0.09 | 0.32 |
| FDP_4 | 0.18 | 0.05 | 0.40 |
| SVP_3 | 0.18 | 0.07 | 0.33 |
| SP_3 | 0.16 | 0.07 | 0.26 |
| FDP_3 | 0.14 | 0.07 | 0.23 |
| CVP_1 | 0.13 | 0.07 | 0.21 |
| FDP_2 | 0.13 | 0.04 | 0.25 |
| Indep_3 | 0.12 | 0.06 | 0.19 |
| SVP_2 | 0.09 | 0.03 | 0.19 |

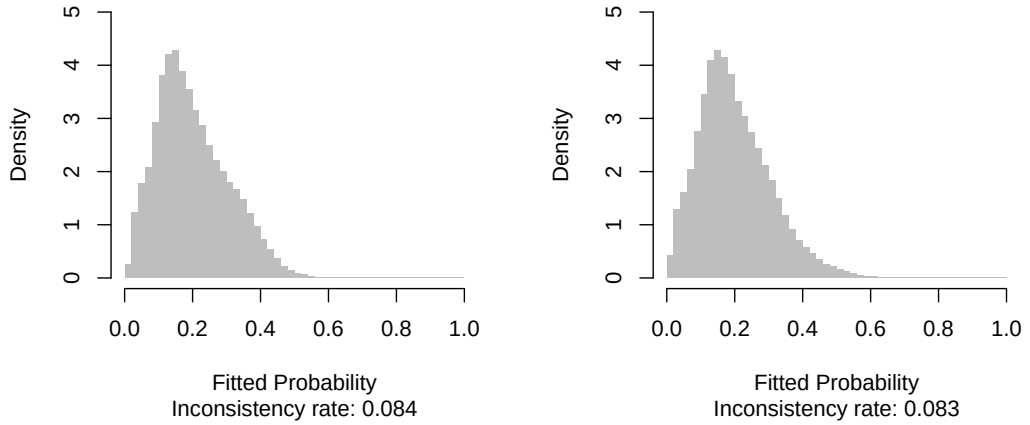
*Note*: This table presents estimates for judges' individual preferences based on the chair model that controls for case language and uses hierarchical priors on the judges.

**Table 1.7:** Judges' Preference Estimates, Median Model (2007)

| Judge | Point Estimate | 2.5% | 97.5% |
|---|---|---|---|
| SP_1 | 0.49 | 0.31 | 0.78 |
| Indep_2 | 0.46 | 0.25 | 0.76 |
| SP_4 | 0.44 | 0.25 | 0.75 |
| SP_6 | 0.41 | 0.18 | 0.71 |
| CVP_4 | 0.39 | 0.22 | 0.67 |
| SP_2 | 0.37 | 0.20 | 0.70 |
| Indep_6 | 0.34 | 0.18 | 0.69 |
| CVP_2 | 0.31 | 0.15 | 0.60 |
| SP_5 | 0.31 | 0.11 | 0.61 |
| FDP_5 | 0.29 | 0.17 | 0.49 |
| Indep_4 | 0.28 | 0.13 | 0.53 |
| Indep_1 | 0.26 | 0.10 | 0.59 |
| SP_7 | 0.25 | 0.06 | 0.51 |
| FDP_1 | 0.23 | 0.05 | 0.52 |
| FDP_2 | 0.23 | 0.06 | 0.42 |
| Indep_7 | 0.22 | 0.05 | 0.48 |
| FDP_4 | 0.18 | 0.04 | 0.49 |
| Indep_5 | 0.17 | 0.03 | 0.36 |
| Indep_3 | 0.17 | 0.05 | 0.29 |
| CVP_5 | 0.17 | 0.03 | 0.39 |
| FDP_6 | 0.14 | 0.03 | 0.28 |
| SVP_3 | 0.13 | 0.03 | 0.27 |
| SVP_2 | 0.12 | 0.03 | 0.25 |
| CVP_3 | 0.11 | 0.02 | 0.27 |
| FDP_3 | 0.11 | 0.02 | 0.28 |
| SP_3 | 0.10 | 0.02 | 0.24 |
| CVP_1 | 0.10 | 0.02 | 0.20 |
| SVP_1 | 0.10 | 0.02 | 0.22 |

*Note*: This table presents estimates for judges' individual preferences based on the median model that controls for case language and uses hierarchical priors on the judges.

**Figure 1.10:** Predicted Probability of Successful Appeal




**(a)** Chair **(b)** Median

*Note*: This graph shows the predicted probability of successful appeal for each case under the chair model, given the empirical compositions of the judicial panels of cases submitted during the first three quarters of 2007.

## 1.B Author Contributions

Each author contributed to this paper significantly and participated in the work equally. Names are listed in alphabetical order.

- **Study conception and design:** Dominik Hangartner, Benjamin Lauderdale, Judith Spirig
- **Acquisition of data:** Dominik Hangartner, Judith Spirig
- **Cleaning and preparation of data:** Judith Spirig
- **Statistical analysis:** Benjamin Lauderdale
- **Interpretation of data:** Dominik Hangartner, Benjamin Lauderdale, Judith Spirig
- **Drafting of manuscript:** Dominik Hangartner, Benjamin Lauderdale, Judith Spirig
- **Critical revision:** Dominik Hangartner, Benjamin Lauderdale, Judith Spirig

# 2

# Do Fewer Judges Reach Different Decisions? Evidence from a Procedural Change in Asylum Appeal Decision Making

Judith Spirig

One of many dimensions along which courts differ is panel size. Whereas some courts hear cases en banc, others do so in panels of between nine and three judges or even have two or one judge(s) decide cases. Fueled by pressures to organize procedures more efficiently, one strategy adopted by policy-makers has been to reduce judicial panel size. Yet, we have only very limited empirical evidence as to if and how that affects judicial decisions.

This paper investigates whether the introduction of the so-called simplified procedure that effectively reduced the number of judges on a panel from three to two in cases 'clearly with or without merit' led to significantly different appeal decisions. Drawing on the experience of the Swiss Federal Administrative Court and a dataset of all asylum appeals that were decided in Switzerland between 2007 and 2015, I show that fewer judges make more restrictive asylum appeal decisions. A fuzzy regression discontinuity design approach suggests that appeals lodged after the introduction of the new procedure and thus decided by one judge with the consent of a second instead of a three-judge panel were much less likely to be granted than comparable cases lodged before the introduction of the simplified procedure. Though perhaps particularly consequential in the field of asylum law, this finding draws attention to the importance of decision-making procedures for the consistency of judicial decisions more broadly.

## 2.1 Introduction

The number of judges deciding a case varies dramatically across courts. Whereas on average higher courts have larger panels or even handle cases 'en banc',[1] there is no standard as to how many judges this involves. In the U.S., for example, the Supreme Court hears cases en banc, state supreme courts have between five and nine-judge panels, courts of appeals decide most cases in panels of three (see Halberstam 2015) and trial courts usually have single judges make decisions (see Kornhauser and Sager 1986). In some courts, panel size also varies across cases: there are many courts where court presidents or chief justices not only choose which judges serve on a given panel but also how many. Others have differently sized panels as a function of case importance or difficulty (see, e.g., Alarie and Green 2017).

If anything, it appears that (panels of) higher courts have historically become larger,[2] while lower courts exhibit a trend toward having smaller groups of judges make decisions. Since 2000, for example, the New Hampshire State Supreme Court has allowed three-judge panels to decide cases "unlikely to generate legal precedent" (Halberstam 2015, 103); since 2002, single judges (instead of three-judge chambers) decide most cases within the civil sections of German regional courts (§348 German Code of Civil Procedure); and in Switzerland, experts see a trend toward an expansion of the jurisdiction of single judges (Freiburghaus 2012; Reiter 2015).

As many courts have struggled with increasing workload and a backlog of cases,[3] it might come as no surprise that some have implemented a reduction in panel size to improve the efficiency and cost-effectiveness of decision making. Reductions in panel size appear to be particularly frequent in the context of asylum and immigration matters, where a reduction in the duration of decision-making processes has also been sought for further reasons: quicker decisions reduce the

1 All judges at a court decide cases together.

2 Take, for example, the U.S. (see Hessick and Jordan 2009) or the Canadian Supreme Court (Alarie and Green 2017).

3 See, for instance, Barger (2002) or a Transactional Records Access Clearinghouse (TRAC) report about a 28% increase in the number of criminal and civil filings in U.S. federal district courts between 1993 and 2014: http://trac.syr.edu/tracreports/judge/364/.

time until rejected asylum seekers can be deported (see Benson 2006; Legomsky and Rodriguez 2005; Thomas 2005), thereby also lowering incentives to lodge frivolous claims in order to delay deportation. Such changes have taken place in several European countries and in the U.S. While the United States Board of Immigration Appeals (BIA) handled all appeals en banc until 1988, it subsequently adopted a three-judge panel system and, in 1999, saw regulations introduced that have allowed the chair of the BIA to authorize single-member decisions for designated categories of appeals.[4] In 2002, among further revisions, the use of single-judge decisions was substantially expanded and became the norm (see Legomsky and Rodriguez 2005).

In 2008, the Swiss Federal Administrative Court (FAC), which decides all appeals pertaining to asylum matters in Switzerland, experienced a similar procedural change. As part of the partial revision of the Swiss Asylum Act that was passed by the Swiss parliament in 2005 and affirmed in a national referendum in 2006, it was decided that starting on January 1, 2008, the court should use a 'simplified procedure' for asylum appeals that are 'clearly with or without merit'.[5] As a consequence, since January 1, 2008, three-judge panels no longer handle all cases that fulfill the formal requirements. Instead, cases 'clearly with or without merit' are decided directly by the chair judge, with the consent of a second judge.

The focus on 'clear-cut' cases for smaller panels is not exceptional. Cases assigned to fewer judges are often those considered clear-cut, obvious, unlikely to generate precedent and/or of less importance (see Alarie and Green 2017; Freiburghaus 2012; Halberstam 2015; Legomsky and Rodriguez 2005). Implicitly underlying these provisions assigning effectively less complicated or important cases to fewer judges is the assumption that panel size potentially matters more for more difficult and wide-ranging cases, but it does not, or at least matters less, or with negligible consequences, for clear-cut cases.

This paper addresses the second implicit assumption and tests empirically whether fewer judges reach different decisions, even if they do so in cases they deem 'clearly with or without merit'. The case of the Swiss FAC asylum divisions

4 The designated cases were affirmations of appeals of immigration judges' decisions other than asylum appeals (see Legomsky and Rodriguez 2005).

5 See art. 111 par. 1 let. e of the Asylum Act (https://www.admin.ch/opc/en/classified-compilation/19995092/index.html).

lends itself to the analysis of the impact of panel size on judicial outcomes not only because of the new decision-making procedure introduced by the revised Swiss Asylum Act but also because of the court's quasi-random allocation of judges to panels and positions within panels.[6] Against the backdrop of the exogeneity of case allocation, this institutional change is an intervention that allows for the causal identification of the effect of a reduction in panel size on appeals' chances to be granted. In this paper, I do so by employing a fuzzy regression discontinuity (RD) design. Exploiting the temporal distance of appeals' submission dates to January 1, 2008, I estimate whether comparable cases received different decisions as a result of whether they were handled by a three-judge panel or a single judge with the consent of a second. The appeals submitted closest to January 1, 2008 are excluded, creating a so-called donut hole, because the simplified procedure could also be applied retrospectively and only reached a stable level of application after a few weeks. As a consequence of this approach, I can directly compare the grant rate of appeals that were decided by three judges instead of a chair judge with the consent of a second judge, simply because they were submitted before January 1, 2008 rather than afterward.

I find that the introduction of the simplified procedure led to a 23 percentage point decrease in the grant rate of *compliers*—those cases that were handled by three judges because they were lodged before the new procedure existed but would have been decided by a chair judge with the consent of a second judge, had they been lodged after the introduction of the new procedure (and vice versa). As a consequence, roughly 300 of the 1451 cases submitted in 2008 and handled under the simplified procedure received a different decision than they would have under the ordinary procedure. In terms of the overall grant rate, the introduction of the simplified procedure translates into a reduction of the grant rate of about eight percentage points.

These findings raise considerable concern about consistency in asylum appeal decision making. Even though asylum adjudication is an area of law where inconsistency is perhaps more likely to occur than in other areas—not only be-

6 The court's quasi-random allocation procedure ensures the FAC's compliance with art. 30 par. 1 of the Federal Constitution of the Swiss Confederation stipulating that "[a]ny person whose case falls to be judicially decided has the right to have their case heard by a legally constituted, competent, independent and impartial court. Ad hoc courts are prohibited."

cause asylum policy has been among the most ideologically salient issues in recent years, but also because cases often boil down to whether a claim(ant) is credible (see Thomas 2006)—the criterion for the application of the simplified procedure ('clearly with or without merit') does suggest that inconsistencies such as the ones documented were not explicitly intended by legislators. Consequently, there is ample need to know more and understand better the effects of certain structures and procedures of judicial decision making, especially in the context of asylum and immigration law.

This paper is structured as follows. After the existing literature on judicial decision making is explored in the next section, Section 2.3 elaborates on the institutional background of the FAC, thereby providing the context for the empirical strategy of this study (Section 2.4). Section 2.5 presents the main finding, followed by a series of robustness and placebo tests. Section 2.6 discusses complier characteristics and possible mechanisms, before Section 2.7 concludes.

## 2.2 Literature Review and Theory

A relatively large literature investigates the impact of various parameters of judicial decision-making processes on case outcomes. Perhaps most prominent among them are the decision makers themselves. Several recent analyses show that the identity of the judges that hear a case matters (see, e.g., Abrams et al. 2012; Boyd et al. 2010; Glynn and Sen 2015). Exploiting the random assignment of cases to judges, these studies illustrate that verdicts vary in response to the judges assigned to a case. There is some evidence that in particular the aspect of judges' identity that is in some way connected to or made salient by the case (i.e., gender in sex discrimination cases or race in racial discrimination cases) is relevant (see, e.g., Boyd et al. 2010; Kastellec 2013). Beyond ascriptive characteristics, judges' ideological preferences are frequently studied in terms of their influence on judicial decisions (see, e.g., Lauderdale and Clark 2012; Law 2004; Sunstein et al. 2007). Similar to ascriptive characteristics, judges' ideology seems particularly important for decision making in politically salient areas of the law such as asylum adjudication (see, e.g., Shapiro and Murphy 2011).

In the context of asylum law, several studies document rather large disparities in

grant rates between asylum adjudicators in the U.S. and Canada (Ramji-Nogales et al. 2007; Rehaag 2007). As shown in Chapter B 1, considerable between-asylum judge disparities also exist at the Swiss FAC. Like the connection between a judge's gender and her vote in sex discrimination cases, Hangartner et al. (2018) find that asylum judges' party affiliations correlate with their preferred grant rates in expected ways: whereas right-wing Swiss People's Party judges are on average less likely to grant appeals, judges from the left-wing Green or Social Democratic parties are more likely to.[7]

Another branch of the literature perceives of judges as strategic actors that display behavior that is best analyzed if understood, as Epstein et al. (2013, 26) put it, as "self-interested behavior [...] in a labor-market setting." From this perspective, it is less judges' characteristics and ideological preferences than their aim to maximize re-election chances (Lim et al. 2015), reduce workload, avoid effort and increase leisure time (Epstein et al. 2013) that influences their behavior.

Both of these perspectives on judges' behavior inform the research on how judges make decisions in groups. Since in many contexts judges do not decide cases individually but in panels, the literature on judgment aggregation and panel effects analyzes how judges aggregate their individual judgments into joint panel decisions and which factors influence that process. Fischman (2011), for instance, shows that there is a 'norm of consensus' among U.S. federal circuit judges that leads judges to vote against their true preferences (i.e., to agree with other judges on the panel instead of dissent), because dissent comes with a cost. A paper by Kastellec (2013) on the effect of having a single black judge on U.S. courts of appeal's three-judge panels documents that a panel is more likely to decide in favor of affirmative action programs if a single black judge is present.[8] These 'panel effects' have not only been researched with regard to judges' ascriptive charac-

7 In Switzerland, most judges are implicitly required to become party members (or at least supporters), at the latest before standing for elections. One of the ideas behind this requirement is to have a judiciary that is representative of the Swiss population in terms of its socio-political views (see Raselli 2011). Accordingly, when electing federal judges to courts, the Swiss parliament respects so-called voluntary party quotas (Kiener 2001) to have the bench approximately reflect parties' strength in the parliament. For further information, see Raselli (2011) or Chapter B 3.

8 Boyd et al. (2010) and Farhang and Wawro (2004) find similar effects of having a woman on panels (deciding sex discrimination cases).

teristics, but also related to their position or role on the panel. Bonneau et al. (2007), for instance, have shown that the majority opinion writer's judgment is decisive for judicial outcomes.

Even though this literature indicates that both judges' identity and panel and decision-making procedures matter, the impact of the size of a judicial panel on a case's outcome has so far received relatively little attention. Maybe this is not surprising, because traditionally, under the assumptions of simple majority vote and sincere voting, studying the effect of panel size on judicial outcomes seems relatively straightforward. Applying Condorcet's jury theorem to judicial panel decision making, Kornhauser and Sager (1986) theorized this insight. If we assume that i) judges are more likely than not to choose the correct outcome, ii) vote independently and iii) in a simple majority vote, the more judges there are on a panel, the more likely it is that the case is decided accurately.[9]

Yet, as seen above, insights from recent research in judicial politics and group decision-making challenge the assumption that there are no panel effects. If there are panel effects—some judges might have more influence than others due to ascriptive characteristics (see Boyd et al. 2010; Kastellec 2013) or their position on the panel (Bonneau et al. 2007)—more judges might not necessarily reach different or more accurate decisions.[10] Empirical analyses of panel size effects that could inform these debates, however, are scant.[11] And, due to the inherent difficulty in measuring the accuracy of a decision, the empirical work studying the causal effect of panel size on the accuracy of judicial decisions stems from an experiment: Van Dijk et al. (2014) had social science students decide simulated criminal law cases on the basis of probabilistic evidence and show that having groups of three rather than individuals make decisions reduces the error

9 The question whether large groups make more accurate decisions has of course also been studied in many other contexts; see Kerr et al. (1996) and Lorenz et al. (2011) for a short overview of the 'wisdom of crowds' literature.

10 Halberstam (2015), for instance, argues that larger panels at U.S. state supreme courts reverse more cases and are more likely to be wrong.

11 There is a growing literature studying optimal panel size in courts where chair justices can determine panel size (see, e.g., Alarie et al. 2011; George and Guthrie 2009; Hessick and Jordan 2009), which is beyond the scope of this paper.

rate.[12] For the same reason, observational studies focus instead on consistency in decision making. Relying on essentially correlational evidence, Halberstam (2015) suggests that larger panels at U.S. state high courts are more likely to reverse lower court decisions than smaller panels. To the best of my knowledge, there are no studies that leverage a natural experiment to analyze whether having fewer judges on a panel has an effect on case outcomes, even though this is crucial for understanding how different court structures and decision-making procedures affect judicial decisions.

Applying the insights from the literature to the case of the FAC asylum divisions yields two potential hypotheses. On the one hand, under Condorcet's jury theorem, we would expect the accuracy of decisions to decrease with fewer judges. Given that Hangartner et al. (2018) find a correlation between judges' party affiliation and their preferred grant rates (Chapter B 1), some decisions could turn out more lenient and others more restrictive, but the average probability of a case to be granted should not change (only the variation would). On the other hand, perceiving of judges as strategic actors sheds light on changes in the incentive structure created by the simplified procedure. In addition to effectively allowing the chair judge to decide the case herself, decisions under the simplified procedure are generally less work intensive (a summary of reasons suffices), especially if they are rejections (see Epstein et al. 2013).[13] Since the average grant rate of asylum appeals is relatively low—around 15% for cases submitted in 2007[14]—it is not surprising that cases deemed 'clearly with merit' are rare, even among the more liberal judges. Accordingly, if the simplified procedure is mainly an option for cases with a lower probability of being granted, the average grant rate of cases could drop after the introduction of the simplified procedure for two reasons: first, because judges deem cases 'clearly without merit' to reduce workload, and second, because judges use the new procedure in situations in which they fear a three-judge panel decision could turn out differently. Therefore, I hypothesize that the grant rate of asylum appeals decreases in response

12 See Lorenz et al. (2011) for experimental evidence beyond judicial group decision making. They find that social groups make pretty accurate decisions if members have no knowledge of one another's individual decisions.

13 This was also revealed in a personal communication with a scribe at the court, 2014.

14 Note that this number includes cases dismissed before the substantive trial.

to the introduction of the simplified procedure. To contextualize this hypothesis and pave the way for the empirical strategy, the next section delves into the institutional background of the court and asylum appeal decision making.

## 2.3 Background and Data

### 2.3.1 Institutional Background

The case of the FAC lends itself to the analysis of the effect of panel size reduction on judicial decisions for several reasons. First, the FAC is the only court that handles asylum appeals lodged in Switzerland. Second, it assigns appeals quasi-randomly to judges and third, it implemented a policy change that creates temporal variation in panel size. To lay the foundation for the empirical strategy of this paper, I will elaborate briefly on these features below.

#### FAC Asylum Divisions

Established in 2007, FAC Divisions IV and V decide all appeals of federal administrative decisions in the field of asylum law.[15] Between 2007 and 2015, this includes about 40,500 unique decisions of which by far the largest share are appeals of negative or dismissive asylum application decisions. The appeals are lodged by asylum seekers or their legal representatives against the Swiss State Secretariat for Migration (SEM, in the case of an appeal) or the FAC (in the case of requests for revisions). Prior to 2007, asylum appeals were decided by the Swiss Asylum Appeals Commission (AAC) that was part of the Swiss Justice and Police Department, as is the SEM. When asylum appeal decision making was moved to the FAC, judges that had previously worked within the AAC had to be confirmed by the Swiss parliament, which is responsible for the election of

15 Accordingly, not all appeals are of negative asylum decisions. Smaller shares of cases are appeals of other asylum decisions, such as those granting subsidiary protection but not asylum or allowing deportation to another Dublin country under the Dublin Regulation. Collectively, these will be referred to as 'asylum appeals' in the remainder of the paper. A complete list of legal matters can be found in Section A 1.A.

judges to federal courts. Even though there is an informal requirement that federal judges need the support of a political party to get elected (see, e.g., Raselli 2011), an exception was made for asylum judges in the elections to the first FAC. Due to their expertise, judges that had already worked as asylum judges within the AAC were nominated and elected even if they chose not to join a party. The two asylum divisions encompass about thirty judges, some of which have been replaced since 2007.[16] Replacement judges are also elected by the United Federal Assembly, as are serving judges in uncompetitive retention elections every six years.

### Decision-Making Procedure

Since its establishment, the FAC has employed software specifically designed for the court to allocate judges to panels (see Schuppisser 2007). The assignment is conditional on a number of criteria such as the language of the first-instance decision and judges' language abilities (German, French or Italian, the official Swiss languages) and whether the judge has additional functions and tasks at the court.[17]

After the court's software assigns three judges to a case—chair judge, second judge and third judge—the chair judge receives all files from the first instance, usually the SEM. If all formal requirements are fulfilled, the chair judge, together with a scribe, processes the case and drafts a decision. All files, together with the draft decision, are then forwarded to the second judge who can propose minor or major changes and agree or disagree with all or parts of the verdict

16 Judges who left the FAC asylum divisions have done so either when they retired or to switch to another FAC division. Over the course of the years 2007 and 2008, four judges switched to FAC Division III that deals with public health and social policy. Through 2015, fourteen judges left the FAC asylum divisions. Replacement judges are nominated by the parliament's multi-party judicial commission in accordance with the respective party factions in the parliament. Since it is an implicit goal of the selection procedure to have the parties' strength in the parliament reflected in the judicial body (see, e.g., Kiener 2001; Raselli 2011), nominated judges are usually members (or at least supporters) of underrepresented parties at the time of election—if suitable candidates, i.e., those with the necessary qualifications, can be found. Accordingly, the share of judges from the initially underrepresented Swiss People's Party (SVP), for instance, increased from three in 2007 to six in 2015.

17 See Chapter B 1 for more details.

and subsequently forwards everything to the third judge. The third judge goes through the same process and returns all files to the chair judge. In case of major disagreements, the chair judge produces a new draft, and the circulation takes another turn. If the panel cannot reach a consensus, the final decision is made by a simple majority vote. If the proposed changes are minor, the chair judge produces a new draft decision, informs the second and third judges about the adopted changes and finalizes it. This sequential, paper-based decision-making procedure in a three-judge panel is referred to by the court as 'ordinary procedure'. Cases that do not fulfill all formal requirements, such as when an advance on costs is demanded and not paid by the appellant, are dismissed directly by the chair judge, without the involvement of any other judge. For the purpose of this paper, I will refer to these decisions as 'true' single-judge decisions.[18]

### Institutional Change

In September 2006, Swiss voters decided on a partial revision of the Swiss Asylum Act and accepted the changes the parliament had proposed. Among other revisions—most of which went into effect on January 1, 2007—was a procedural change in asylum appeals decision making.[19] Whereas the FAC asylum divisions handled all asylum appeals that chair judges considered to fulfill formal requirements in three-judge panels in 2007, the introduction of the 'simplified procedure' has allowed chair judges to invoke a shorter procedure in which they only need the consent of a second, but not of a third, judge for cases 'clearly with or without merit', since January 1, 2008 (AsylA art. 111 let. e). In addition to the effective reduction in panel size, under the simplified procedure judges only have to provide a summary of reasons and "may dispense with an exchange

18 A note on terminology: For the purpose of this paper, the following terms are used interchangeably, all referring to the procedure introduced on January 1, 2008: simplified procedure, new procedure, single+ decision. Whereas 'true' single-judge decision refers to cases decided exclusively by the chair judge in a non-substantive trial, single+ decisions are, like three-judge decisions, substantive decisions. Because both 'true' single-judge decisions and single+ decisions are not panel decisions, I will also refer to them as 'non-panel decisions', as opposed to panel decisions that include all decisions by three or more (the few leading decisions are made in panels of five) judges.

19 For a list of changes in asylum law that were implemented on January 1, 2008, see Section 2.A.

of written submissions" (AsylA art. 111a, par. 1 + 2).[20] As opposed to the ordinary procedure in which the second and third judges can propose minor or major changes, the second judge in a case that is handled under the simplified procedure can essentially only consent. If he disagrees either with the verdict or the classification as 'clear-cut', he triggers the ordinary procedure in which the third, previously excluded, judge is put back on the panel. According to a scribe at the court, however, this happens very rarely.[21]

The idea behind this change was—as is the rationale behind many other judicial reforms—to reduce the cost of the asylum determination procedure and shorten the time that people who will not be allowed to remain stay in Switzerland.[22] Even though the introduction of the simplified procedure for clear-cut cases was subject to discussion in the parliament and criticized by a number of Social Democrat and Green MPs, it was not among the most controversially discussed changes in the public debate leading up to the referendum vote in September 2006.[23]

While the simplified procedure was introduced on January 1, 2008, judges were given some leeway: it was also applicable to pending proceedings that were genuinely only at the beginning of being decided. Judges were, however, discouraged from using it for cases lodged before 2007, because, realistically, cases that were submitted in 2006 or before could hardly be considered clear-cut, given that they had not been decided within over a year.[24] As a consequence, instead of a discontinuity in cases' probability of being handled under the simplified procedure,

20 These additional provisions also apply to 'true' single-judge decisions. See Section 2.A in the Appendix for the full legal text of the relevant law.

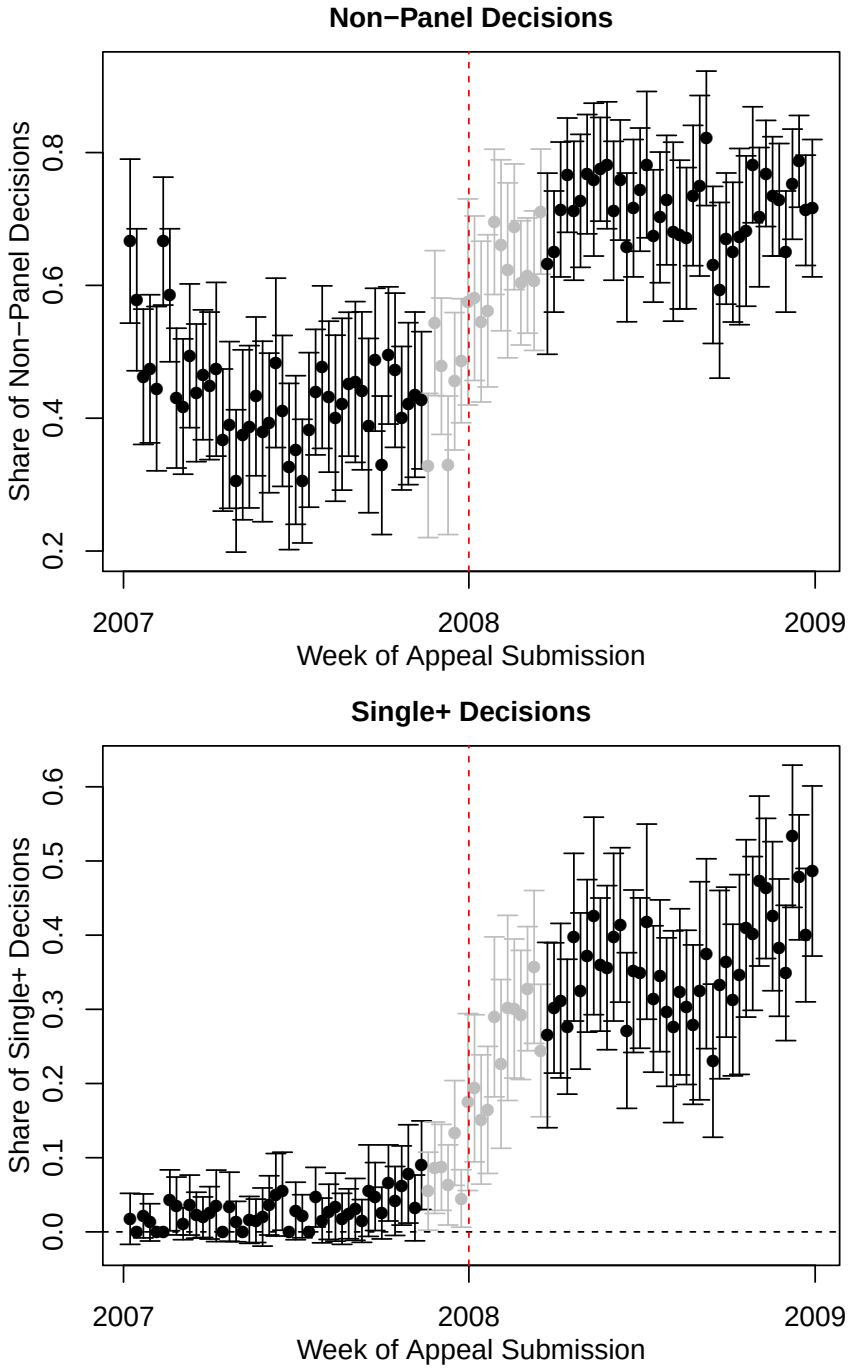
21 As revealed in personal communication, this happens in about one of fifty cases.

22 See, for example, the statement of the Social Democrat MP Maria Roth-Bernasconi in the parliamentary debate about the partial revisions of the Swiss Asylum Act in the fall of 2005: "The goal of these dispositions is to accelerate asylum procedures, which comprise the asylum appeal procedure, and to reduce the duration of stay of people who are not recognized as refugees." (Originally in French: "Ces dispositions ont pour but d'accéleérer les procédures d'asile y compris durant la procédure de recours, et de réduire la durée de séjour des personnes qui ne sont pas reconnues en tant que réfugiés.") See https://www.parlament.ch/de/ratsbetrieb/amtliches-bulletin/amtliches-bulletin-die-verhandlungen?SubjectId=9387.

23 See, for instance, the list of revisions that Amnesty International was most opposed to at https://www.amnesty.ch/de/laender/europa-zentralasien/schweiz/asylsuchende/asylgesetzrevision2006/asylgesetzrevision.

24 Personal communication with a scribe at the court, 2014.

**Figure 2.1:** Share of Non-Panel Procedure by Week of Appeal Submission (First Stage)




*Note*: The upper graph displays the probability of cases lodged in a given week to be decided under a non-panel procedure ('true' single judge or single judge with the consent of a second (single+ decisions)). The lower graph focuses on substantive decisions ('true' single-judge decisions were dropped from the analysis) and displays the probability of substantively tried cases lodged in a given week to be decided under the simplified procedure. The lines in both graphs indicate 95% confidence intervals. The dots in gray represent the disregarded observations within the donut hole.

the 'treatment' probability starts increasing before January 1, 2008 and only becomes relatively stable in March 2008 (see Figure 2.1). This phasing-in provides a challenge to estimating the effect of the institutional change on the probability of an appeal's being granted, because it blurs the discontinuity needed in RD designs: Rather than a jump in the probability of treatment assignment on the day of the introduction of the simplified procedure, there is a continuous increase between late 2007 and early 2008. To deal with this challenge, I will employ a so-called donut hole approach, as discussed in greater depth in Section 2.4.

### 2.3.2 Data

To analyze the effect of the simplified procedure on asylum appeal decisions, I draw on a dataset that covers all decisions in asylum matters by Divisions IV and V at the FAC between 2007 and 2015. The dataset was obtained from the FAC and contains information as to which judges decided a case, the country of origin of the appellant, the appeal submission and decision dates, the verdict, the legal matter and the procedure applied ('true' single-judge decision, simplified procedure (single+ decisions), ordinary procedure (panel decisions)). About two thirds of all decisions are published and publicly available on the court's web page. For these decisions, it was possible to expand the dataset, for example with the date of reception of the first-instance decision. All decisions are handled and written in one of the three official Swiss languages, German, French or Italian. The language of the decision is generally determined by the language used in the first-instance decision and cannot be determined by the judge. Because not all judges speak all three languages, case language is one of the variables that influences the assignment of judges to cases.

The main outcome of interest—the verdict—is coded as 'granted' or 'rejected'. Partly granted appeals are considered 'granted' rather than 'rejected' because they potentially bring about an improvement for the appellant. For most of the analyses, appeals that are dismissed by the chair judge in a single-judge procedure 'without entering into the substance of a case' (i.e., are not tried substantively) are considered 'rejected'. To study the effect of the introduction of the simplified procedure, I combine both 'true' single-judge decisions and single+ decisions, as opposed to panel decisions, because these are both procedures in

which the chair judge is explicitly in charge. However, as a robustness test (see Section 2.B.2), I drop all cases that were decided by a 'true' single judge and therefore did not receive a substantive trial, and focus entirely on substantively decided cases for the analysis. Cases that were 'written off' by the chair judge are disregarded altogether, because they are arguably neither against nor in favor of the appellant. Of the cases submitted in 2007 and 2008 that inform the analysis in this paper, 1,179 were written off, 3,981 were rejected, 1,897 were dismissed, 931 were granted and about 100 received 'another' decision (i.e., their file was forwarded to the correct addressee). 1,596 were handled under the simplified procedure, 3,064 by a 'true' single judge, 3,407 by a panel of three and 24 by a panel of five judges.

## 2.4 Empirical Strategy

### 2.4.1 Identification

The co-occurrence of several institutional features at the FAC discussed above allows for the identification of the causal effect of the simplified procedure on appeals' grant rate with a fuzzy RD design that facilitate the identification of causal effects in settings, in which a 'treatment' is assigned according to an observable variable (the running variable) that is unconnected to the outcome in the vicinity of a threshold (see Cattaneo et al. 2018*a*; Imbens and Lemieux 2008). In a sharp RD setting, the probability of a unit to be assigned to the treatment group jumps from zero to one at a quasi-random value of the running variable, whereas in a fuzzy RD, it is sufficient if the probability jumps at all, even if not from zero to one (Van der Klaauw 2002). The continuous inflow of appeals, the exogenously determined assignment of judges onto panels and the comparatively sudden introduction of the simplified procedure for cases 'clearly with or without merit' pave the way for a temporal fuzzy RD with distance (in days) to the threshold (the cutoff date of January 1, 2008) as the running variable, the non-panel procedure as the treatment and a case's verdict as the

outcome.[25]

As Figure 2.1 shows, the probability of a case to be assigned to the treatment group (non-panel procedure) increased rather continuously than discontinuously around the cutoff date (January 1, 2008). Since chair judges were also allowed to apply the simplified procedure to appeals that had been lodged before January 1, 2008, some cases were, even though lodged earlier, handled under the simplified procedure. In addition, the continuation of the increase in the probability of treatment assignment after the cutoff date also suggests that judges needed some time to get accustomed to the new procedure.[26] This continuity around the cutoff date presents a challenge for the fuzzy RD approach because it leads to a relatively weak identification and violates the assumption that the expectation of treatment assignment probability at the cutoff date differs depending on whether it is approached from the left- or the right-hand side (see, e.g., Cattaneo et al. 2018*b*). Thus, to deal with this challenge, I apply the donut hole approach discussed in Eggers et al. (2018) and applied in Almond and Doyle (2011) and Barreca et al. (2011). The donut hole approach disregards observations directly around the threshold, thereby leaving a donut hole around it. As elaborated in more detail in Section 2.4.2, this approach addresses the phasing-in of the new procedure and at the same time brings about a discontinuity, which is one of the main conditions for a fuzzy RD. The benefit of the proposed strategy is twofold. First, in contrast to other studies, I can directly compare how similar appeals are decided under different procedures and therefore do not have to rely on different courts that decide not only in differently sized panels, but might also differ in terms of the cases they hear. Second, not only the cases, but also the decision makers remain the same, allowing for a comparison of the behavior of the same judges under different procedures. The next section will briefly elaborate on the donut hole approach, after which I will delve into testing the essential assumptions underlying the fuzzy RD design to support the validity of my research design.

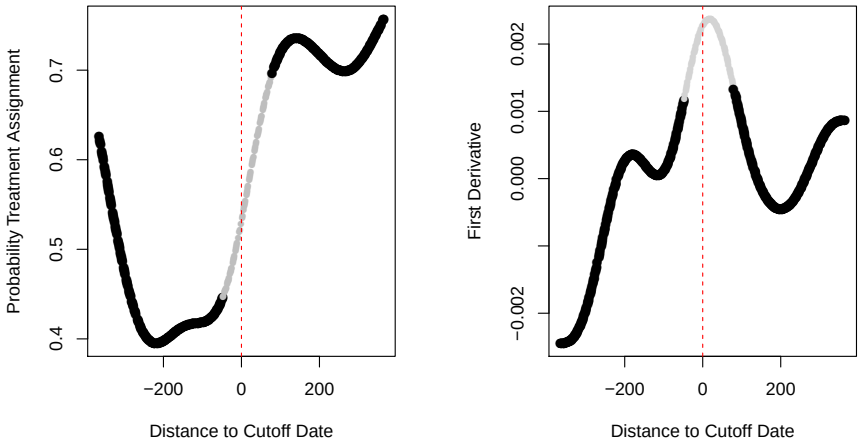
25 Note that the non-panel procedure includes both cases handled by a 'true' single judge and those handled by a single judge with the consent of a second (the simplified procedure).

26 It is a consequence of the phasing-in of the simplified procedure that there is no clear discontinuity at the threshold.

### 2.4.2 Donut Hole Approach

The donut hole approach is essential for the identification of the effect of the simplified procedure on asylum appeals' grant rate, but also introduces some challenges of its own. The main downside of the donut hole is the resulting lack of observations directly around the cutoff date, which not only necessitates more extrapolation (Eggers et al. 2018), but also increases the potential for a violation of the continuity assumption that is necessary to ensure that cases on either side

**Figure 2.2:** Donut Hole Selection

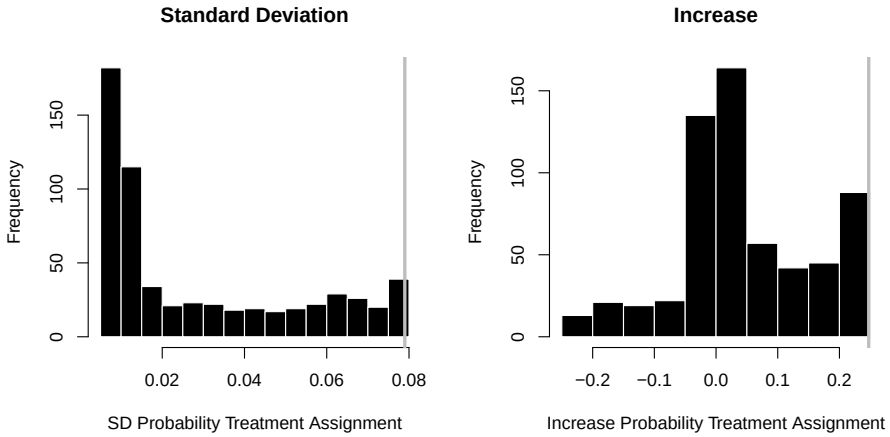



*Note*: The first graph (left) shows predicted probabilities for being handled under a non-panel procedure based on date of appeal submission, using a spline regression. The second graph (right) displays the first derivatives of the predicted probabilities on the left. The gray dots indicate the period between the maximum in the second derivative in the year 2007 and the minimum in the second derivative in the year 2008—where the increase in the probability of being handled under a non-panel procedure changed disproportionately around the cutoff date (between −47 days and +78 days from January 1, 2008).

of the cutoff date are comparable. I address these concerns in three ways. First, I propose a strategy that estimates the optimal size of the donut hole in a data-driven way. As the lower graph in Figure 2.1 shows, the share of cases handled under the simplified procedure is relatively stable for cases submitted during most of the years 2007 and 2008, with the exception of those that were submitted in the vicinity of January 1, 2008. To identify the period during which the probability of a case's assignment to the treatment group (non-panel decisions) changes disproportionately, I use a spline regression to predict daily probabilities of treatment assignment for each day between January 1, 2007 and December

31, 2008 and take the maximum of the second derivative of the spline function in the year 2007 and the minimum in the year 2008 to identify the 'change points', as displayed in Figure 2.2. To further illustrate that the identified optimal donut

**Figure 2.3:** Histograms of Standard Deviation and Increase in Predicted Treatment Assignment




*Note*: Histograms of the standard deviation of (left) and the increase in (right) predicted probabilities of being handled under a non-panel procedure within windows of 125 days (the size of the optimal donut hole suggested by the change points). Increase was calculated based on the difference in the predicted treatment assignment of the first and the last appeal submission date in the window. The gray line indicates the position of the optimal donut hole.

hole captures the period during which the probability of treatment assignment changes disproportionately, I calculate the standard deviation of and increase in the predicted treatment assignment probabilities from above within all windows of equal size as the optimal donut hole (125 days) between January 1, 2007 and December 31, 2008 and compare the distribution of these statistics to those of the optimal donut hole. As Figure 2.3 indicates, the optimal donut hole indeed captures a window with disproportionate dispersion of daily treatment assignment probabilities.

Second, as discussed in more detail in Section 2.4.3, I perform covariate balance tests to explore the validity of the continuity assumption across the donut hole, and, in addition, on either end of it (see Section 2.B.1 for the latter). Finally, I include a sensitivity analysis not only of the window (bandwidth) that I use for the fuzzy RD, but also of the size of the donut hole (see Section 2.5.1).

### 2.4.3 Sorting and Continuity Assumption

One crucial assumption in order for the fuzzy RD to be valid is that there is no sorting around the cutoff date, i.e., that appellants cannot strategically endeavor to have their appeals handled before or after the introduction of the simplified procedure. Even though there is relatively little space for appellants to sort around the cutoff date due to strict closing dates for appeal submission,[27] I provide three sets of evidence suggesting that there is no strategic sorting.

First, I graphically illustrate that the variation in the number of appeals lodged around the cutoff date is not out of the ordinary (lower graph in Figure 2.4). Second, I show that the average duration between first-instance decision reception and appeal submission on either side of the cutoff date is similar (upper graph in Figure 2.4). If appellants sorted around the cutoff date, we would expect to see that, on average, they take more or less time to lodge an appeal after having received a first-instance decision. If they anticipated that the introduction of the simplified procedure leads to lower grant rates, we should see a shorter duration between first-instance decision and appeal submission before January 1, 2008. Yet, as Figure 2.4 shows, the number of appeals received at the beginning of January 2008 is slightly lower—as we would expect due to the lack of first-instance decisions over the Christmas and New Year holiday period—, but not different from other years.

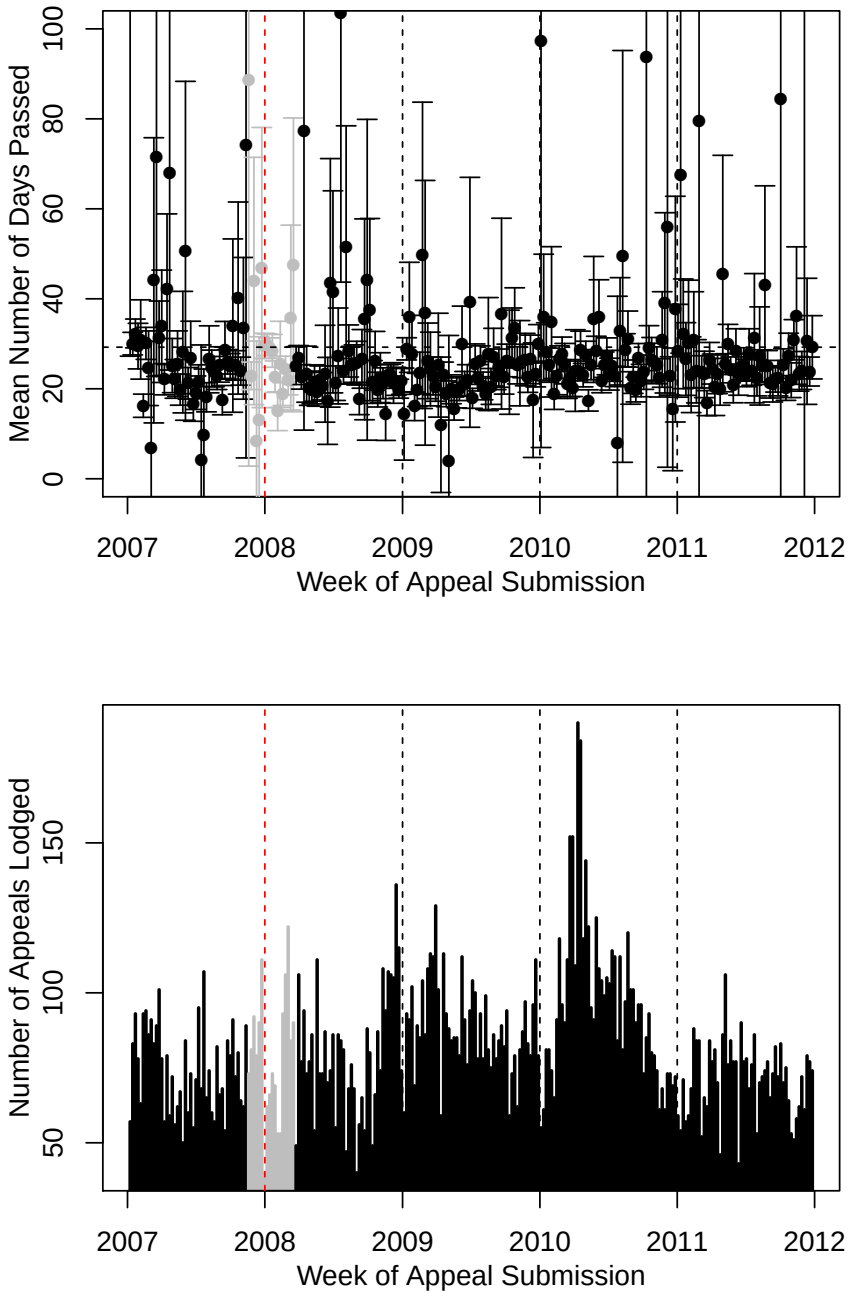
Finally, I conduct the McCrary (2008) density test, one of the standard tests in RDs to check for manipulation of the running variable and find that the density of the running variable (appeal submission date) prior to the cutoff date is not significantly different from that afterward (McCrary test statistic of $-0.12$, with a $p$-value of .9).[28]

A second crucial assumption in order for the estimation to be valid is that cases on either side of the cutoff date are continuous in terms of all unobservable

27 Depending on the first-instance decision—more time is given to appeal substantive decisions than dismissals 'without entering into the substance of the case'—asylum seekers have to lodge appeals within a period that is relatively short (between five working days and thirty calendar days). There are appeals that are accepted after a longer period, many of which were lodged by asylum seekers who are still in their countries of origin and had claimed asylum through a Swiss embassy abroad.

28 As in the fuzzy RD estimation, I set the bandwidth to 365 days.

**Figure 2.4:** Frequency and Average Submission Duration Distribution



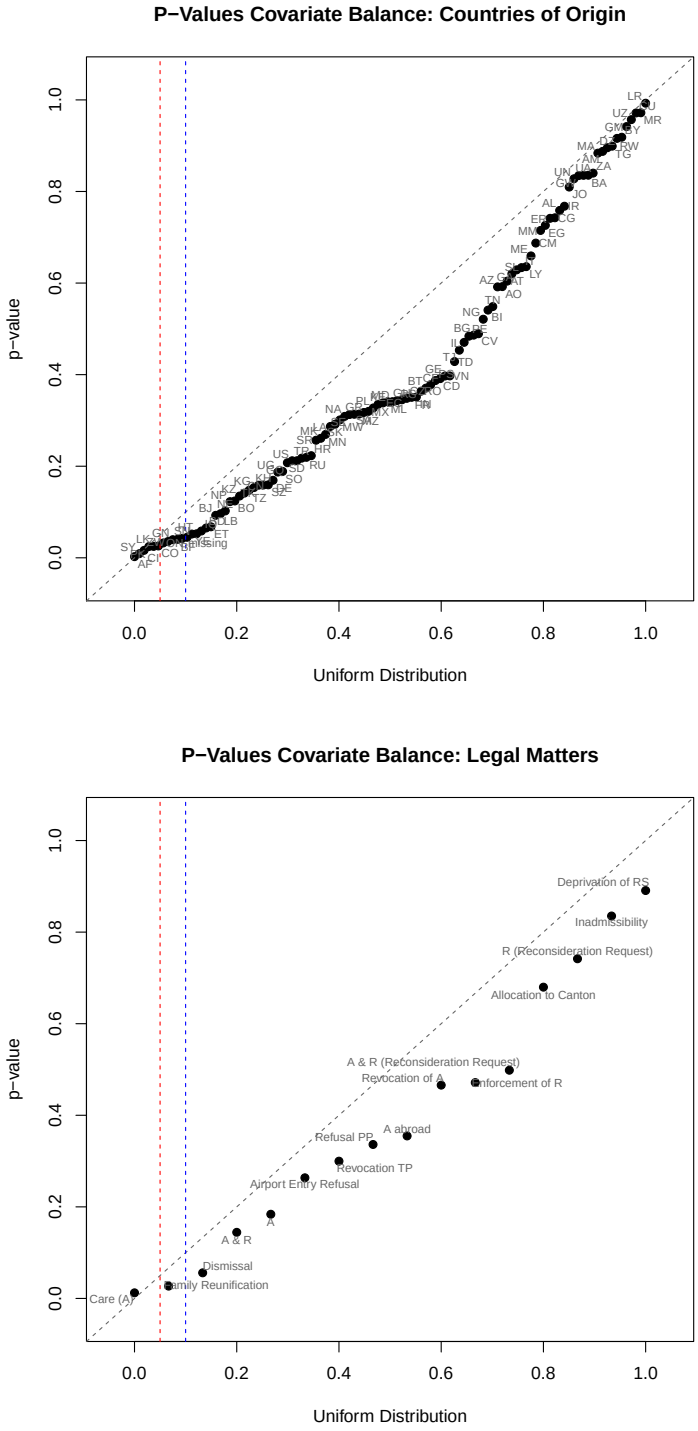

*Note*: The first graph (above) displays weekly averages of the number of days that passed between reception of the first-instance decision and appeal submission, with 95% confidence intervals. Note that this information exists only for cases that received a substantive trial (i.e., not for cases decided by a 'true' single judge). The second graph (below) presents weekly numbers of lodged appeals (all cases). The red dashed line denotes the cutoff date (January 1, 2008), and the black dashed lines denote January 1 in subsequent years. The gray colored areas are those within the donut hole.

factors (Hahn et al. 2001). The most important (unobservable) factor that has to be continuous in order for this study to be valid is the merit of appeals. If, for some reason, appeals that are lodged after January 1, 2008 generally have lower merit and are less likely to be granted than cases lodged in 2007, this assumption would be violated. Even though there is no straightforward relationship between the date of appeal submission and a case's merit,[29] case characteristics change over time, for a variety of reasons: The situations in asylum seekers' countries of origin may change over time, as might the first instance's decision making. In any event, if the average merit of cases suddenly changed between 2007 and 2008, it would bias the results. In the absence of a direct measure for a case's merit, an indirect test of the continuity assumption is to look at whether the distribution of observable covariates is continuous around the cutoff date. The covariates that are most closely related to the merit of a case and that are not endogenous to the decision-making procedure are appellants' countries of origin.

To test whether countries of origin are balanced across the cutoff date, I create binary indicators for all countries of origin of appellants who lodged cases in 2007 and 2008 and use them as outcomes in the same specification as the one employed in the main fuzzy RD analysis—including the donut hole—instead of the dummy for whether a case was granted (see, e.g., Eggers et al. 2018). In addition, I perform the same analysis for the legal matter of a case. The results of both analyses are displayed in Figure 2.5. Both graphs in Figure 2.5 present the distributions of $p$-values that indicate the probability that a particular covariate (country of origin or legal matter) is unbalanced across the cutoff date. If covariates were truly randomized, the $p$-values would have a uniform distribution, and we would therefore see them follow the dashed diagonal lines. Even though the $p$-values in the graphs do not exactly follow the dashed line, they approximate it and suggest only slight imbalances. Accordingly, to address potentially remaining imbalances, I also estimate a version of the main

29 Note that in many other (fuzzy) RDs, that is the case. Studies that look at awards or scholarships assigned based on school test scores (see, for example, Van der Klaauw (2002), or Lee and Lemieux (2010) for an overview) and their effect on educational outcomes or enrollment, for example, have to deal with a clear trend: all else being equal, better test scores are related to better school performance. Accordingly, a very narrow bandwidth around the threshold is critical in order to be able to compare treatment and control groups and not to violate the assumption that treatment is as-good-as randomly assigned in the vicinity of the threshold.

**Figure 2.5:** Covariate Continuity




*Note*: Both graphs display $p$-values of point estimates of the effect of the introduction of the simplified procedure (instrumented by the cutoff date (January 1, 2008)) on the probability of a case to be lodged by an appellant of a specific country of origin (upper graph) and in a specific legal matter (lower graph). Truly randomized covariates would produce $p$-values that follow the dashed diagonal line.

fuzzy RD that includes controls for appellants' countries of origin and the legal matters of cases. As the estimates from Model (2) in Table 2.1 show, the results are very robust to controlling for both covariates.

As a consequence of the donut hole approach, in addition to the assumption that cases are continuous in their merit across the cutoff date, I also need to assume that the continuity assumption holds across both ends of the donut hole, to ensure that the extrapolations to the cutoff date are valid. To address this additional assumption, I perform the same balance tests for the same covariates not only across the donut hole, but also on either end of it. As Figure 2.9 in Section 2.B.1 in the Appendix illustrates, observable covariates (legal matter and country of origin) are balanced across both donut hole ends. In sum, these indirect tests of the continuity assumption lend credibility to the validity of the fuzzy RD approach with a donut hole around the cutoff date.

### 2.4.4 Estimation

In order not to have to make assumptions about the functional form of the regressions for both the relationship between the running variable and treatment assignment (decided by fewer than three judges), as well as between treatment assignment and outcome (probability of a case to be granted), I use local linear regressions to estimate the causal effect of the introduction of the simplified procedure on cases' grant probability.[30] Since the fuzzy RD can be reframed as an intention-to-treat (ITT) analysis—in which the cutoff date is used to instrument for the treatment—I will present separate estimates for the first stage (the increase in the probability to receive the treatment at the cutoff date), the ITT effect (the effect of the introduction of the simplified procedure on the average grant rate) and the local average treatment effect (LATE) for compliers; in other words, the causal effect of the introduction of the simplified procedure on the grant rate of cases that are decided under a non-panel procedure, if lodged after

30 In comparison to other semi-parametric regression approaches (e.g., kernel regression), local linear regression has the advantage that it does better at estimating the boundary points. This is crucial in an RD design, since the treatment effect is estimated based on the difference between two boundary points. In RDs with a continuous running variable, the local linear regression design estimator has become the standard estimator (see, e.g., Cattaneo et al. 2018*b*; Li and Racine 2007).

the cutoff date, but would be decided under the ordinary procedure, if lodged before the cutoff date. Note that in all specifications, I include two covariates: the case's chair judge and language. I do so because assignment to the simplified procedure ('treatment assignment') is quasi-random near the cutoff date only conditional on the chair judge and, indirectly, the language of a case, because the chair judge determines treatment assignment on the case level and case language influences the allocation of judges to cases (see, e.g., Eggers et al. 2018).

## 2.5 Results

For the main results, I estimate the first stage, ITT and LATE for compliers effects based on a sample of 5,564 asylum appeals that were lodged between January 1, 2007 and December 31, 2008, disregarding those submitted within the optimal donut hole specified in the previous section (between November 15, 2007 and March 19, 2008). As Figure 2.7 in Section 2.5.1 shows, the point estimates of these effects are reasonably insensitive to different bandwidths and donut hole sizes. Note that all specifications include controls for the chair judge and the case language, as discussed in the previous section. In a second specification (Model 2 in column 2 of Table 2.1), I additionally employ controls for the appellant's country of origin and the legal matter of the case.

I begin by investigating the first stage, i.e., the relationship between an appeal's submission date and its probability of being decided under a non-panel procedure. The first stage is crucial for a valid fuzzy RD because it ensures that there is a discontinuity in terms of the application of the non-panel procedure that can be exploited. As Figure 2.1 shows, there is a clear pattern of a case's probability of being handled under a non-panel procedure. The first stage regression confirms this visual: regressing an indicator for non-panel procedure on a case's distance (in days) to the cutoff date (the instrument), interacted with a binary indicator for before/after the cutoff date, I find that the probability of being assigned to a non-panel procedure increases by about 40 percentage points on January 1, 2008 (see Row 1 in Table 2.1). An $F$-Test confirms the strength of the first stage: testing against the null hypothesis that cutoff distance had no

effect on the probability of treatment assignment, reveals an $F$-Test statistic of over 80, which can be considered very strong (see Feir et al. 2016).[31]

**Table 2.1:** Results Main Specification

| | *Dependent variable:* | |
|---|---|---|
| | *granted* | |
| | *Fuzzy Donut Hole RD* | |
| | Model | Model |
| | (1) | (2) |
| First Stage | 0.401 (0.044) | 0.400 (0.040) |
| ITT | -0.079 (0.033) | -0.080 (0.030) |
| LATE | -0.235 (0.090) | -0.240 (0.090) |
| Chair Judge | ✓ | ✓ |
| Case Language | ✓ | ✓ |
| Country of Origin | | ✓ |
| Legal Matter | | ✓ |
| Optimal Donut Hole | ✓ | ✓ |
| First Stage $F$-Test Stat | 82.48 | 89.25 |
| Observations | 5,564 | 5,564 |

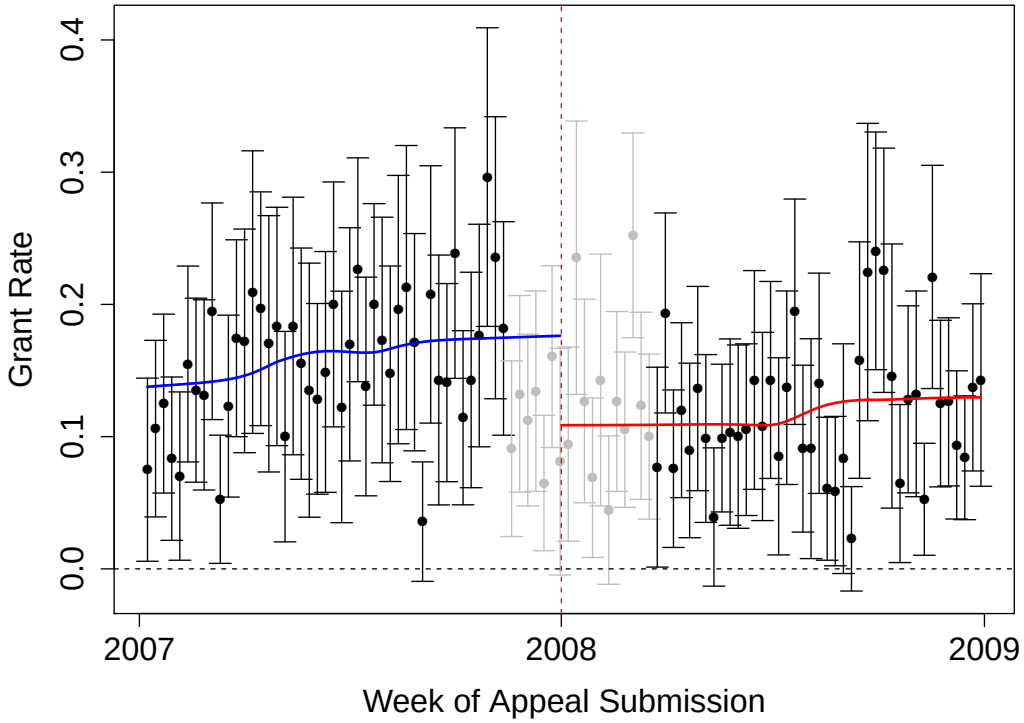
*Note:* This table presents the results for the main specification with a donut hole between −47 und +78 days around January 1, 2008. The bandwidth is 365 days on either side of the cutoff date. Both models include controls for chair judge and decision language and have clustered standard errors (in brackets) on the chair judge level. Model (2) additionally includes controls for the appellant's country of origin and the legal matter of the case.

In a second step, I estimate the ITT effect by instrumenting for the non-panel procedure with the cutoff date. The ITT measures the impact of the introduction of the simplified procedure on the average grant rate of all cases, not only the compliers. As column 2 in Table 2.1 shows, there is a substantial and statistically significant negative effect of the simplified procedure on the grant rate, which

31 As displayed in Table 2.3 in Section 2.B.2 of the Appendix, the first stage is even stronger when focusing exclusively on cases that received a substantive trial.

is reduced by about eight percentage points. Figure 2.6 illustrates this effect graphically.

**Figure 2.6:** Intention-to-Treat Effect




*Note*: The graph displays the ITT effect for the main specification with a donut hole between −47 and +78 days around January 1, 2008 and a bandwidth of 365 days. The lines are fitted with loess.

Finally, by dividing the ITT effect by the share of compliers—i.e., the first stage—I get the complier average treatment effect.[32] In other words, the cutoff date (January 1, 2008) is used to instrument for treatment assignment in a two-stage least squares regression. The result is displayed in row 3 of Table 2.1. Cases that are decided under a non-panel procedure as a result of their submission date (i.e., the simplified procedure) are about 23 percentage points less likely to be granted than comparable cases that were decided by three-judge panels. Since the share of appeals that were submitted in 2008 and were granted under the

32 Also referred to as the LATE for compliers.

simplified procedure is below 5%, this constitutes a dramatic reduction in the average grant rate of compliers.

In sum, these results document a large negative effect of the simplified procedure—having one judge with the consent of a second judge decide a case—on a case's probability of being granted. In contrast to the expectation that the grant rate is not affected by a reduction in panel size, they provide evidence of a significant decline. And, as the next section indicates, they are also robust to sensitivity checks and a placebo test.

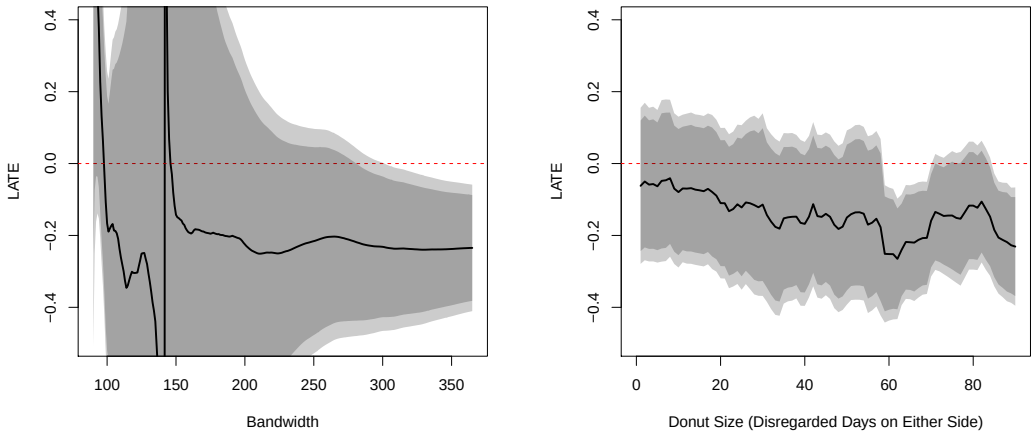
### 2.5.1 Robustness

The main results presented above are fairly robust to bandwidth choice and donut hole size, especially with regard to the point estimates. The graph on the left-hand side of Figure 2.7 shows both point estimates and confidence intervals for bandwidths between 90 and 365 days around the cutoff date. The point estimate is always negative and relatively stable between a bandwidth of 200 and 365 days. In terms of significance, as expected, power declines with bandwidth and fewer observations: the smaller the sample, the larger the confidence intervals.

The right-hand side graph in Figure 2.7 depicts the point estimates and confidence intervals for different sizes of the donut hole around the cutoff date. Realistically, if there is no discontinuity in treatment assignment probability around the cutoff date (for very small or inexistent donut holes), the LATE for compliers point estimates are small and insignificant. However, with an increasing donut hole size and a consequently stronger first stage, the point estimates become relatively stable.

A second test of the validity of the findings is a placebo test. The placebo test puts the findings into perspective by asking how likely I am to find similar results if we pretend that the policy change took place on another day. Thus, it tests for whether the results are likely to have occurred by chance and not because of the policy change itself. I implement this placebo test by taking the first day of each month between March 1, 2008 (toward the end of the donut hole) and January 1, 2015 as the placebo cutoff date and estimate both the first stage effect and

**Figure 2.7:** Sensitivity Check: Different Bandwidths and Donut Holes




*Note*: These graphs display LATE point estimates for compliers for different bandwidths (left) and differently sized donut holes (right). On the left, the donut hole remains fixed between −47 and +78 days around the cutoff date, as in the main specification. On the right, the bandwidth remains fixed at 365 days, as in the main specification. The light gray shade represents 95% confidence bands, and the dark gray shade denotes 90% confidence bands. For all estimates, I include controls for chair judge and decision language and cluster standard errors on the chair judge level.

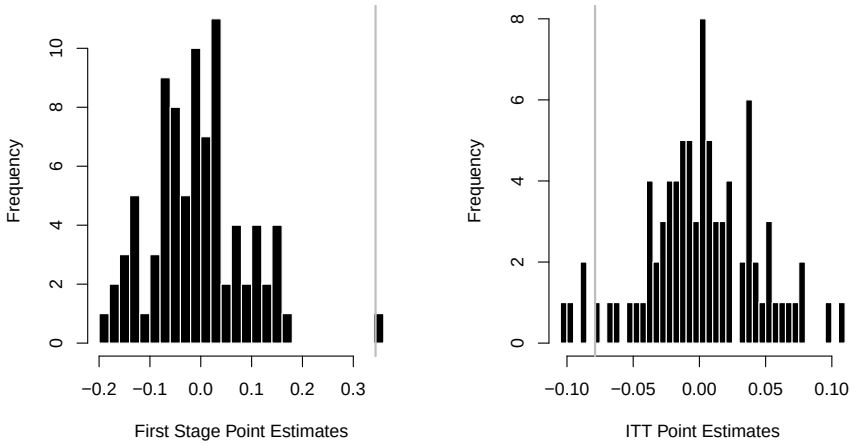
the ITT effect and compare them with the estimates based on the actual cutoff date.[33]

Figure 2.8 presents histograms for the distribution of the first stage and ITT effect point estimates for all placebo cutoff dates. They illustrate that both the first stage effect based on the actual cutoff date (left graph, two-sided empirical $p$-value of .01) and the ITT effect point estimate based on the actual cutoff date (right graph, two-sided empirical $p$-value of .08) are exceptionally large.

To sum up, both the sensitivity checks and the placebo tests provide support for the credibility of the main results.

33 I focus on ITT and first stage, and not the LATE for compliers, because without a first stage, the LATE for compliers is invalid.

**Figure 2.8:** Placebo Test: Point Estimate Distributions




*Note*: These graphs illustrate the distribution of the first stage effect of cutoff distance on the application of the simplified procedure (left) and the ITT effect of the introduction of the simplified procedure on a case's probability of being granted (right) based on the first day of each month between March 2008 and January 2015 as placebo cutoff date. The gray lines represent the corresponding estimates for the actual cutoff date (January 1, 2008).

## 2.6 Discussion

### 2.6.1 Complier Characteristics

While the ITT effect provides an estimate of the causal effect of the introduction of the simplified procedure on the average probability of all cases to be granted, this does not mean that the introduction of the new procedure had a direct effect on all cases' probability of being granted. Rather, it has a direct impact on compliers, but not on those cases that were handled under a non-panel procedure no matter when they were lodged (the so-called always-takers, mostly 'true' single-judge decisions) or those cases that were handled by three judges, irrespective of when they were lodged (so-called never-takers).[34] Accordingly, (only) about 40% of cases—the proportion of compliers as indicated by the first stage—are directly affected by the introduction of the new procedure.

34 Note that the specification (in the Appendix) that disregards all cases without a substantive decision (those decided by 'true' single judges) is a case of one-sided non-compliance, with almost no always-takers. In this case, we have a situation where the LATE for compliers is also the average causal effect on the treated.

To understand better what is different about the cases that experience a decline in the probability of being granted as a consequence of the new procedure, I draw on Abadie's (2003) kappa-weighting scheme as outlined in Angrist and Pischke (2008). This scheme allows me to compute the mean of the distribution of a given covariate for compliers, always- and never-takers, to the effect that I can profile each group with regard to which cases are more likely to be assigned to it. The results of the profiling are shown in columns (1)-(3) of Table 2.2.

**Table 2.2:** Complier Characteristics

| | Compliers | Always-Takers | Never-Takers | All |
|---|---|---|---|---|
| Covariate | (1) | (2) | (3) | (4) |
| Nigeria | 0.22 | 0.07 | 0.02 | 0.11 |
| Serbia | 0.08 | 0.10 | 0.11 | 0.09 |
| Iraq | 0.06 | 0.04 | 0.12 | 0.07 |
| Sri Lanka | 0.02 | 0.04 | 0.09 | 0.05 |
| Turkey | 0.04 | 0.05 | 0.07 | 0.05 |
| country missing | 0.03 | 0.10 | 0.00 | 0.04 |
| Afghanistan | 0.02 | 0.03 | 0.07 | 0.04 |
| Ethiopia | 0.03 | 0.03 | 0.06 | 0.04 |
| DRC | 0.03 | 0.04 | 0.04 | 0.04 |
| Eritrea | 0.02 | 0.03 | 0.05 | 0.03 |
| Asylum & Return | 0.24 | 0.44 | 0.61 | 0.42 |
| Dismissal & Return | 0.64 | 0.26 | 0.14 | 0.37 |
| Non-Partisan | 0.25 | 0.20 | 0.20 | 0.22 |
| FDP | 0.19 | 0.28 | 0.16 | 0.20 |
| CVP | 0.22 | 0.16 | 0.19 | 0.19 |
| SP | 0.14 | 0.16 | 0.27 | 0.19 |
| SVP | 0.17 | 0.21 | 0.11 | 0.16 |
| GPS | 0.02 | 0.00 | 0.07 | 0.03 |

*Note:* This table provides information about the compliers. Columns (1)-(4) provide the share of cases with a given characteristic among compliers (1), never-takers (2), always-takers (3) and all cases (4). Calculations for columns (1)-(3) are using Abadie's 2003 kappa-weighting scheme as laid out in Angrist and Pischke (2008). Parties: CVP = centrist Christian Democratic Party, GPS = left-wing Green Party, non-partisan = judges without party affiliation, SVP = Swiss People's Party, FDP = center-right Free Democratic Party, SP = left-wing Social Democratic Party.

As displayed in column (1) of Table 2.2, non-partisan chair judges and chair judges from the centrist Christian Democratic Party (CVP) are more likely to handle compliers (i.e., are more likely to invoke the simplified procedure) than judges affiliated with the left-wing Social Democratic Party (SP). While CVP judges handled 19% of all cases, they handled 22% of compliers, a larger relative share than SP judges, who decided 19% of all cases, but only 14% of compliers.

A case that is decided by at least three judges no matter when it was submitted (never-taker), however, is most likely handled by an SP judge, and a case that is always decided by fewer than three judges (always-taker, i.e., mostly 'true' single-judge decisions) is most likely handled by a judge affiliated with the center-right Free Democratic Party (FDP).

The cases that chair judges are most likely to handle under the simplified procedure are those lodged by asylum seekers from Nigeria and those appealing dismissive asylum applications decisions. More specifically with regard to appellants' countries of origin, Table 2.2 shows while appeals from Nigerians make 11% of all cases submitted in 2007 and 2008 (with the exception of the period in the donut hole), they make up 22% of the compliers. In reverse, appeals lodged by appellants from Afghanistan are less likely to be among the compliers than among those cases always decided by three judges (never-takers). Similarly, the average share of appeals of first-instance asylum application dismissals (Dismissal & Return) is 37%, but it is much larger among compliers (64%). In other words, appeals of first-instance dismissals are much more likely to be handled under the simplified procedure than appeals of negative substantive first-instance decisions (Asylum & Return).

Taken together, the results in Table 2.2 suggest that cases from Nigeria, cases that appeal first-instance dismissals and those handled by non-partisan or Christian Democratic (CVP) judges are those most likely to be affected by the introduction of the simplified procedure. What does that tell us about why judges reject more cases under the simplified procedure than the ordinary procedure?

### 2.6.2 Interpretation

Several aspects discussed in Section 2.2 might be relevant to an explanation as to what causes the negative effect of the simplified procedure on a case's probability of being granted. First of all, previous research has shown that judges' individual preferences matter.[35] Focusing on judges' party affiliation, the shares in columns (1)-(4) of Table 2.2 provide suggestive evidence that judges' preferences might partly be responsible for the negative effect of the introduction

35 Specifically for the case of the FAC asylum divisions, see Chapter B 1.

of the simplified procedure on cases' grant rate: While judges from the left-wing Social Democratic Party (SP) handle a relatively larger share of never-takers, those cases that are decided by three-judge panels and have on average the longest duration and the highest grant rate (compared to compliers and always-takers), non-partisan and CVP judges decide relatively larger shares of cases under the simplified procedure, compared to both SVP and SP judges. This pattern correlates with party preferences in expected ways (see Chapter B 1) and provides an insight into the incentives created by the introduction of the new procedure: judges with a preference for lower grant rates could use the simplified procedure as an opportunity to reject more appeals, with less potential opposition.

Yet, if judges' individual preferences play a role, why do left-wing judges not invoke the simplified procedure and grant cases 'clearly with merit'? Drawing on the literature that perceives of judges as strategic actors sheds light on why judges might reject more cases as a result of the introduction of the simplified procedure, even in the absence of a preference for a lower grant rate. As discussed in Section 2.2, one benefit from employing the simplified procedure is a reduction in workload: judges only have to provide a summary of reasons for the decision and may dispense with an exchange of written submissions. The reduction in workload is larger for rejections, because they mean lower costs in terms of time commitment and effort (Epstein et al. 2013; Halberstam 2015). In addition, given the relatively low average grant rate (about 15% for cases submitted in 2007) a case is, in expectation, always more likely to be rejected than granted. Accordingly, a chair judge can expect the second judge to affirm a rejection, but potentially look very closely through a case deemed 'clearly with merit'. The fact that only very few cases are considered 'clearly with merit' and thus granted under the simplified procedure—even by left-wing judges—implies that either only very few cases are in fact clearly with merit and/or that it is extremely difficult to get consent from a second judge to grant such an appeal. In either case, if workload reduction is desired by judges, it seems that rejecting cases under the simplified procedure is the only possibility.

A particular feature of the court's institutional structure might also be at play in this phenomenon. The court's software that assigns judges onto panels and positions within panels quasi-randomly does not take into consideration the dif-

ficulty or complexity of a case. However, if some judges start deciding more cases under the simplified procedure, which is by definition less work intensive, workload imbalance across judges increases. Those judges that make use of the ordinary procedure more often create comparably more work for themselves and for other judges, because the third judge is not taken off those cases. This could create pressure on all judges to apply the simplified procedure more often.

Considering all its effects, the introduction of the simplified procedure might have facilitated the expression of some judges' preference for a lower grant rate by effectively letting chair judges decide substantively tried cases on their own. At the same time, given that cases are on average much more likely to be rejected than granted and judges aim for (relative) workload reduction, the new procedure created incentives to reject more appeals for all judges.

## 2.7 Conclusion

This paper estimates the effect of an institutional change in judicial decision making on appeal outcomes. The change—a shorter procedure with fewer judges to decide cases 'clearly with or without merit'—was included in the partial revision of the Swiss Asylum Law to increase efficiency and reduce cost, without affecting the accuracy of decisions. By having the chair judge decide whether a case is clear-cut and can therefore be decided by her with the consent of only a second judge, rather than in a three-judge panel, cases can be decided faster and with the involvement of fewer judges. The focus on cases 'clearly with or without merit' thereby implies that, for cases' outcomes, it should not matter under which procedure they are decided: because those handled under the new procedure are necessarily clear-cut, whether a chair judge decides it with the consent of a second judge or a panel of three judges handles it, should not lead to different outcomes.

Yet, as this paper shows, there is an effect of having two instead of three judges decide an asylum appeal: as a result of the introduction of the simplified procedure on January 1, 2008, the average probability of an asylum appeal to be granted, declined by about eight percentage points (ITT effect). Since neither cases that were decided by a three-judge panel nor cases that were handled by

a single chair judge in a non-substantive trial, regardless of whether they were submitted before or after the introduction of the new procedure, were affected by it, the change in the average grant rate does not give the full picture. In fact, for those cases that were handled under a different procedure simply because they were submitted shortly before or after January 1, 2008, the effect is much larger: among the compliers, the simplified procedure led to an erosion of the grant rate, which was reduced by 23 percentage points.

The cases affected by the new procedure (the compliers) are a particular subset of asylum appeals. Those lodged by appellants from Nigeria and against first-instance asylum application dismissals are much more likely to be among compliers, especially if handled by judges from center, center-right and right-wing parties. These complier characteristics point to a potential mechanism: the new procedure is used by all judges to reduce (relative) workload, but arguably more so by judges with a preference for a lower grant rate.

These findings raise serious concerns about consistency in asylum appeal decision making. Comparable cases had significantly different chances to be granted, simply as a result of whether they were handled under the ordinary or the simplified procedure. Although asylum adjudication is an area in which inconsistencies are perhaps more expected than in other areas of the law, the focus on clear-cut cases implies that no effects are to be expected. While consistency is an important quality of judicial decisions per se, the lack thereof can be particularly consequential in asylum matters. If we take inconsistency to mean that some cases are not decided correctly, the findings of this paper suggest that a substantial share of compliers—among them many appeals of dismissive asylum decisions that, if enforced, oblige asylum seekers to leave Switzerland—received an inaccurate decision. Thus, they highlight the need for a closer look at the accuracy of asylum appeal decisions in Switzerland, but, given the dearth of empirical evidence on this issue more broadly, they are also valueable for research on the effect of judicial panel size in other contexts and countries.

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# Appendix

## 2.A 2005 Asylum Law Revision

The 2005 partial revision of the Swiss Asylum Act that included the introduction of the simplified procedure also led to a number of other changes to Swiss asylum law. Most of them, however, were implemented on January 1, 2007 and/or did not concern factors that could affect the distribution of cases at the FAC, which would be a potential threat to identification. According to the implementation provisions of the partial revision of the Asylum Act of December 16, 2005, "The [...] implementation provisions of the partial revision of AsylA, which will come into force on January 1, 2008, mainly pertain to the implementation of the procedural, administrative and financially relevant regulations."[36] Note also that the Dublin Regulation was only implemented on December 12, 2008.

Changes in the field of procedures and return:

- The financial responsibility of the Confederation for social assistance is limited to seven years
- New description of the reasonableness of return
- New third-country regulations (easier to return people to safe third countries, replacement of precautionary return with a final decision of inadmissibility)
- The complete asylum procedure can now also be implemented at the airport
- The Federal Council shall regulate the access to legal advice and legal representation at reception and processing centers and airports.
- The Federal Office for Migration (now: SEM) shall interview all asylum seekers
- The Confederation shall provide return assistance

36 See the provisions at https://www.sem.admin.ch/dam/data/migration/rechtsgrundlagen/gesetzgebung/asylg-aug/20070328_ber_vvwaasylv-d.pdf. For an exhaustive list of changes (not only those coming into force on January 1, 2008), see https://www.sem.admin.ch/dam/data/sem/asyl/asylgesetz/teilrevision_asylgesetz/ausbildungsunterlagen/handout_asylgesetz-d.pdf or https://www.sem.admin.ch/sem/de/home/aktuell/gesetzgebung/archiv/teilrev_asylg.html

- New regulations with regard to the accommodation in subsidiary facilities in extraordinary situations

Changes in the field of financing:

- New regulations regarding the financing system between cantons and the federal government
- Social benefits must be refused if the asylum seeker received a negative asylum decision
- Asylum seekers and persons in need of protection without a residence permit who are gainfully employed must pay a special charge to cover the overall costs of the asylum procedure generated by them

The full legal text of the simplified procedure (single+ decision) is the following, of which letter e was implemented on January 1, 2008, as part of the partial revision of the Asylum Act:

**Art. 111 Competence of a single judge**

The following cases may be heard by a single judge:

a. the dismissal of appeals due to irrelevance;
b. summary dismissal of manifestly unlawful appeals;
c. the decision relative to the preliminary denial of entry at the airport and the allocation of a place of stay at the airport;
d. a detention order under Article 76 paragraph 1 letter b number 5 or Article 76a FNA3;
e. with the consent of a second judge: appeals that are clearly with or without justification.

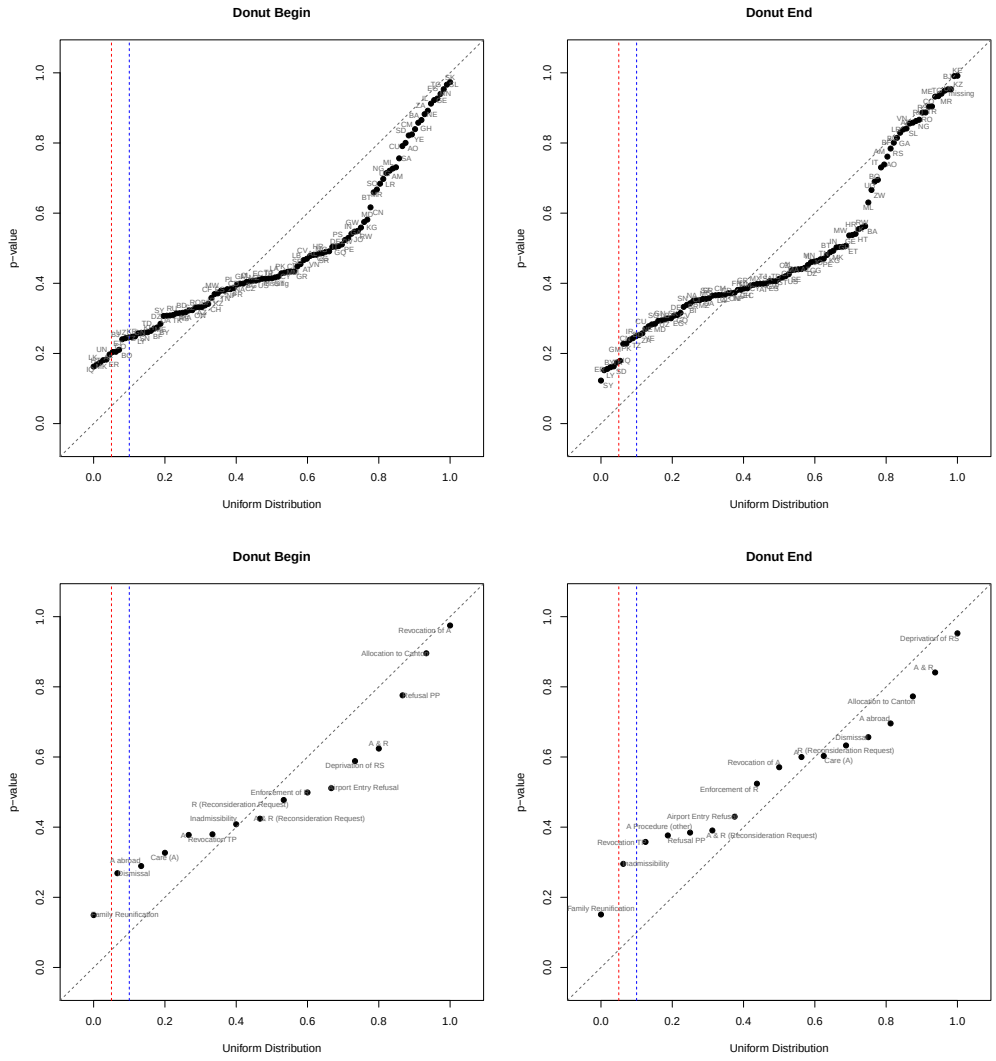
**Art. 111a Procedure and decision**

1. The Federal Administrative Court may dispense with an exchange of written submissions.
2. Appeal decisions in accordance with Article 111 need only be summarily substantiated.

# 2.B Additional Figures

## 2.B.1 Covariate Balance

**Figure 2.9:** Covariate Continuity: Donut Beginning and End

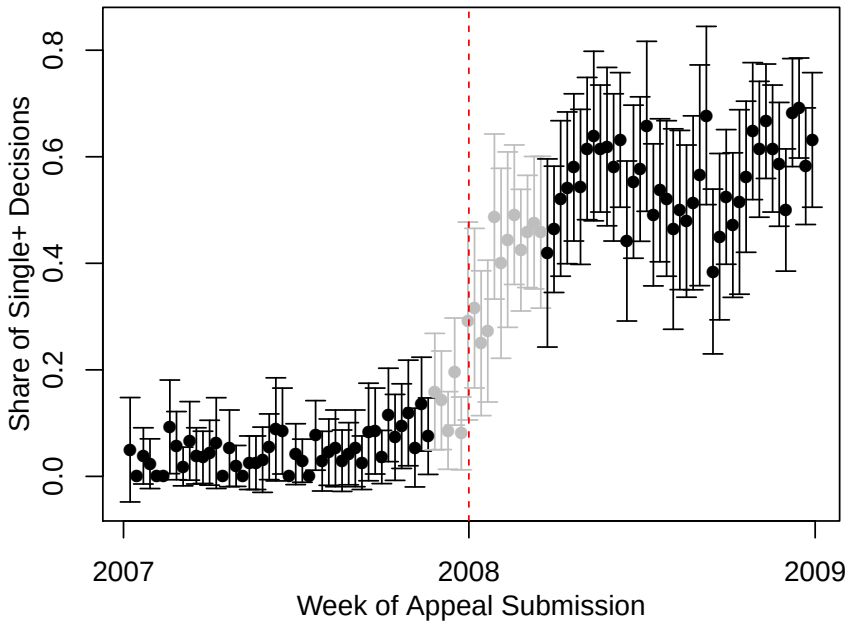



*Note*: Both panels of graphs display $p$-values of point estimates of the effect of the introduction of the simplified procedure, instrumented by the cutoff date, on the probability of a case to be from a specific country of origin (upper panel) and in a specific legal matter (lower panel). The left-hand graphs test the balance of covariates at the beginning of the donut (47 days before January 1, 2008), while the graphs on the right-hand side do so for the end date of the donut (78 days after January 1, 2008). Truly randomized covariates would produce $p$-values that follow the dashed diagonal line.

## 2.B.2 Analysis with Substantive Decisions Only

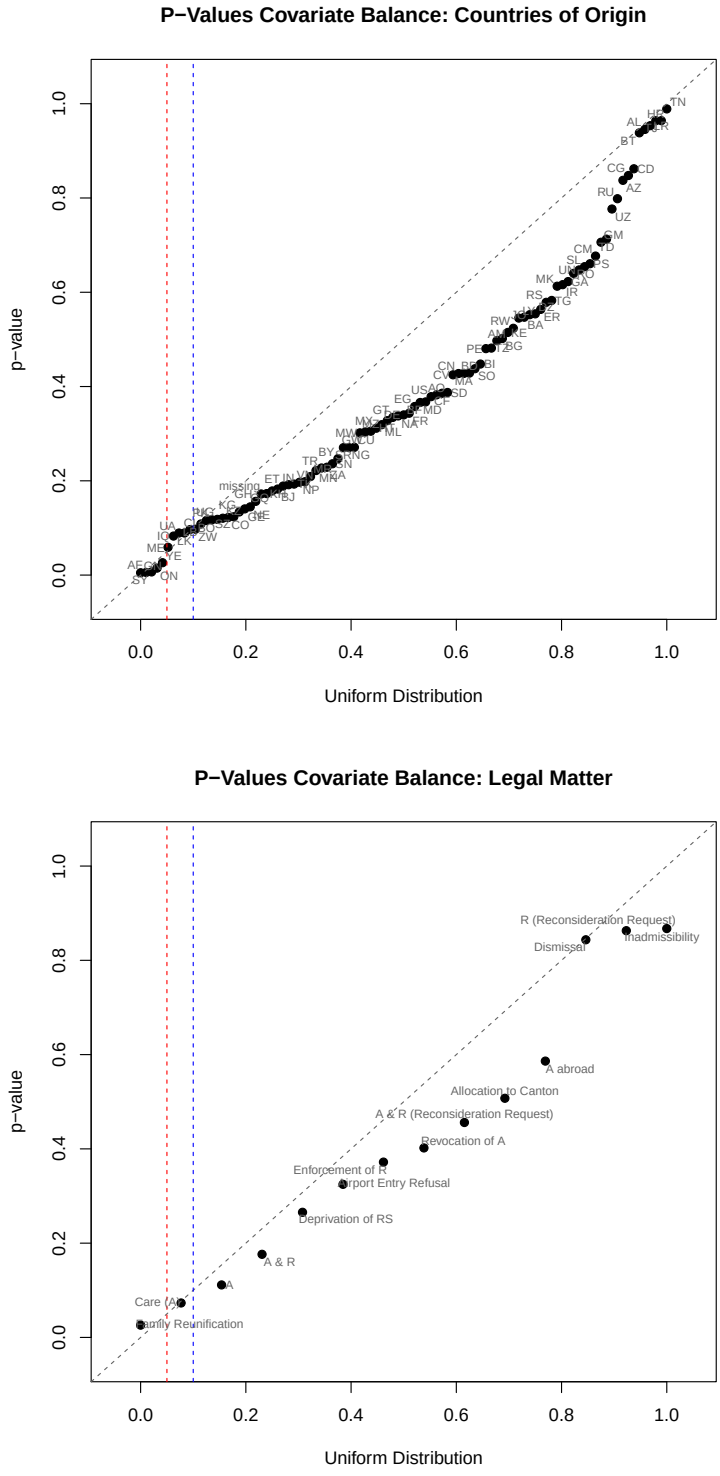
Instead of focusing on the increase in a case's probability of being handled by fewer than three judges (which included 'true' single-judge decisions that did not involve a substantive trial, as well as single+ decisions), as examined in the main analysis of this paper, all analyses in this section focus exclusively on cases that received a substantive trial. Thus, all cases handled by a 'true' single judge are dropped from the sample and only cases that were either treated by a panel of three judges (ordinary procedure) or by the chair judge with the consent of a second judge (simplified procedure) remain.

**Figure 2.10:** First Stage: Substantive Decisions Only



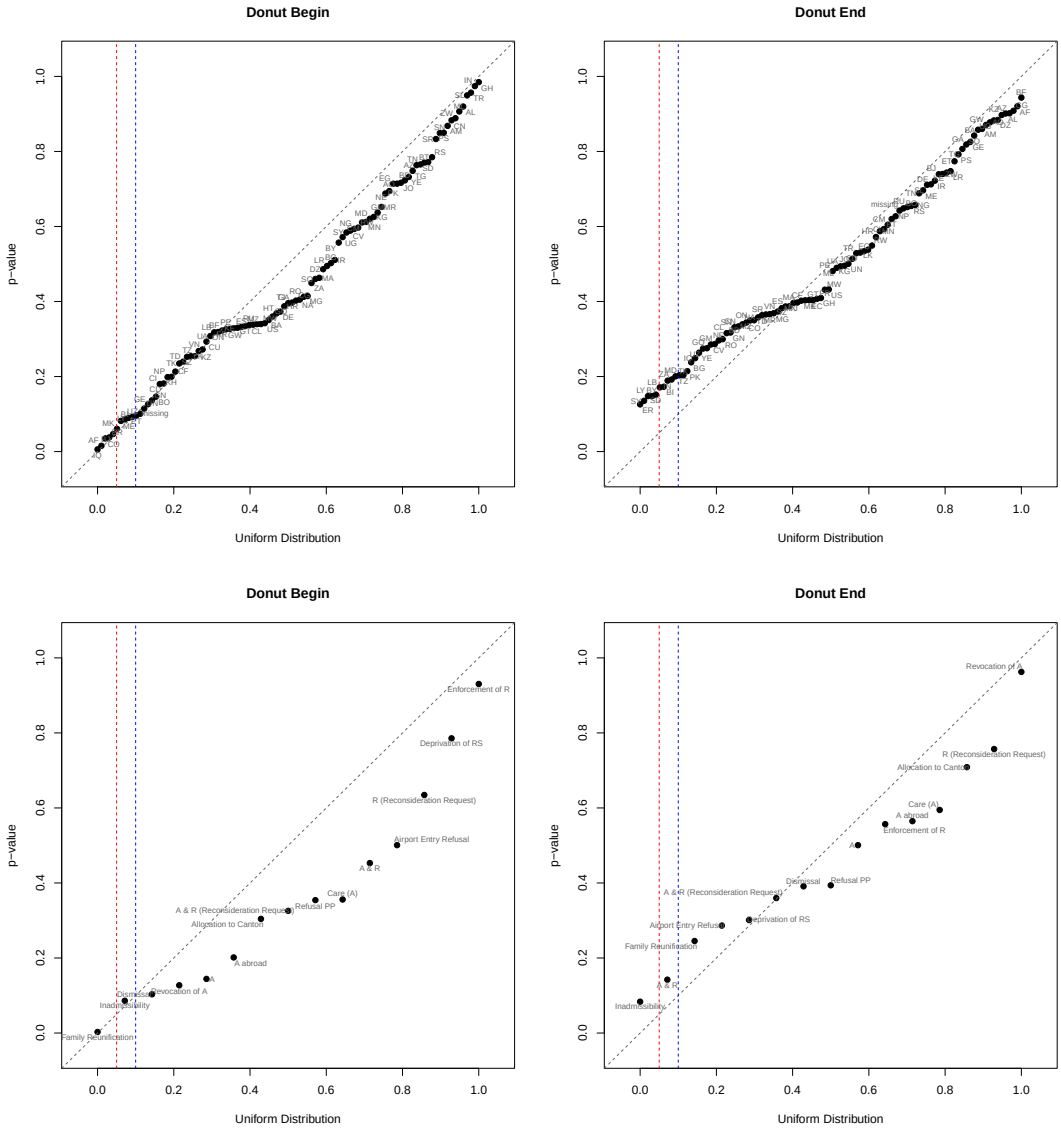

*Note*: The graph displays the probability of cases lodged in a given week begin decided under the simplified procedure (by a single judge with the consent of a second (single+ decisions)). The lines indicate 95% confidence intervals. The dots in gray represent the disregarded observations within the optimal donut hole (between −40 and +78 days from January 1, 2008).

**Figure 2.11:** Covariate Continuity I: Substantive Decisions Only



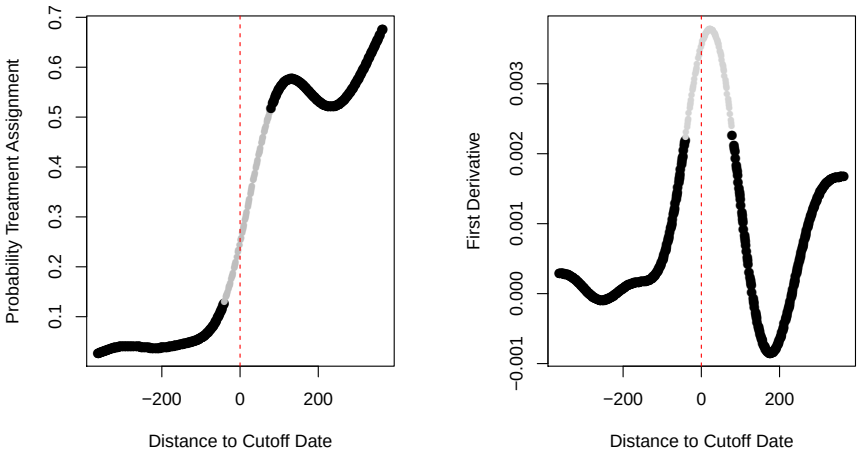

*Note*: Both graphs display $p$-values of point estimates of the effect of the introduction of the simplified procedure (instrumented by the cutoff date (January 1, 2008)) on the probability of a case being submitted by an appellant from a specific country of origin (upper graph) and in a specific legal matter (lower graph). Truly randomized covariates would produce $p$-values that follow the dashed diagonal line.

**Figure 2.12:** Covariate Continuity II: Substantive Decisions Only



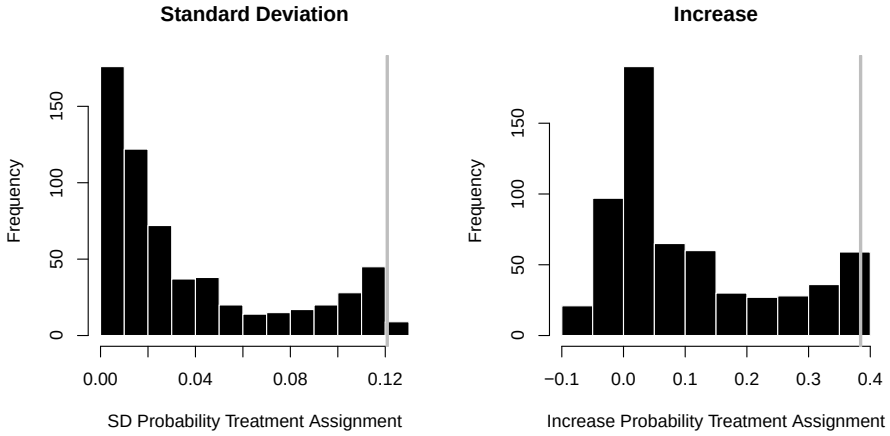

*Note*: Both panels of graphs display $p$-values of point estimates of the effect of the introduction of the simplified procedure, instrumented by the cutoff date, on the probability of a case to be from a specific country of origin (upper panel) and in a specific legal matter (lower panel). The left graphs test the balance of covariates at the beginning of the donut (40 days before January 1, 2008), while the graphs on the right do so for the end date of the donut (78 days after January 1, 2008). Truly randomized covariates would produce $p$-values that follow the dashed diagonal line.

**Figure 2.13:** Donut Hole Selection: Substantive Decisions Only




*Note*: The first graph (left) shows predicted probabilities of a case's being handled under the simplified procedure based on date of appeal submission using spline regression. The second graph (right) displays the first derivatives of the predicted probabilities on the left. The gray dots denote the period between the maximum in the second derivative in the year 2007 and the minimum in the second derivative in the year 2008—indicating where the increase in the probability of being handled under the simplified procedure changed disproportionately around the cutoff date (at −40 days and +78 days from January 1, 2008).

**Figure 2.14:** Histograms of Standard Deviation and Increase in Predicted Treatment Assignment: Substantive Decisions Only



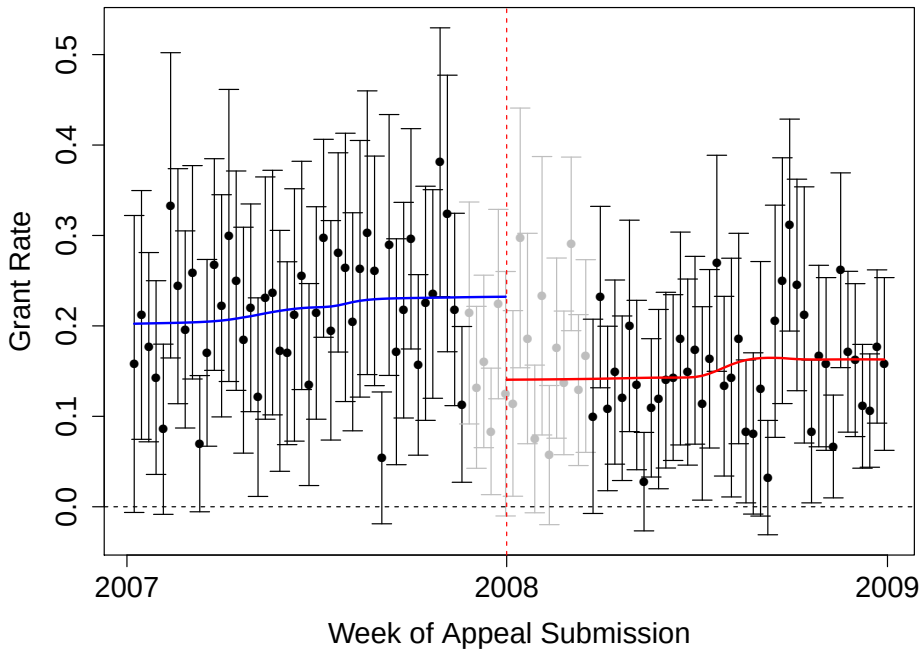

*Note*: Histograms of the standard deviation of (left) and the increase in (right) predicted probabilities of being handled under the simplified procedure by day of appeal submission within windows of the same size as the optimal donut suggested by the change points. The increase was calculated based on the difference in the predicted treatment assignment of the first and the last appeal date in the window. The gray line indicates the position of the optimal donut.

**Table 2.3:** Results Main Specification: Substantive Decisions Only

| | *Dependent variable:* | |
|---|---|---|
| | *granted* | |
| | *Fuzzy Donut Hole RD* | |
| | Model | Model |
| | (1) | (2) |
| First Stage | 0.397 (0.044) | 0.410 (0.040) |
| ITT | -0.104 (0.039) | -0.100 (0.040) |
| LATE | -0.253 (0.094) | -0.250 (0.090) |
| Chair Judge | ✓ | ✓ |
| Case Language | ✓ | ✓ |
| Country of Origin | | ✓ |
| Legal Matter | | ✓ |
| Optimal Donut Hole | ✓ | ✓ |
| First Stage $F$-Test Stat | 93.35 | 111.64 |
| Observations | 4,087 | 4,087 |

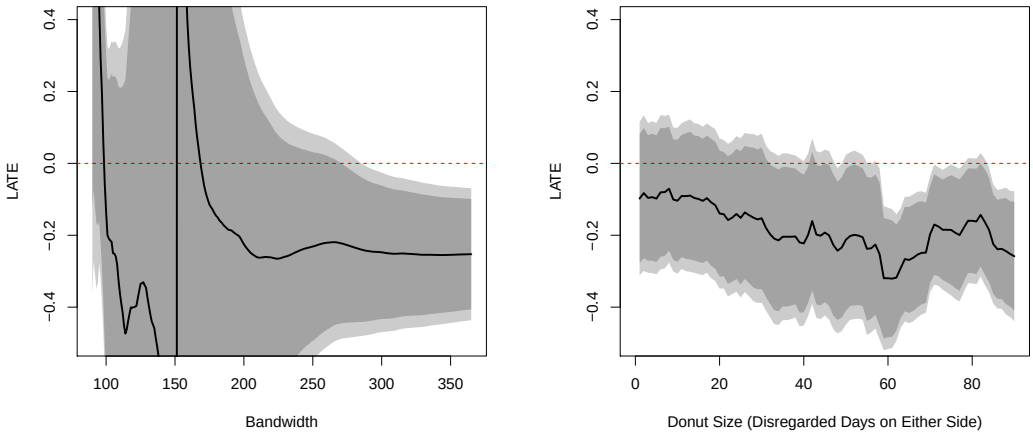
*Note:* This table presents the results for the main specification with a donut hole between −40 und +78 days around January 1, 2008. The bandwidth is 365 days on either side of the cutoff date. Both models include controls for chair judge and decision language. Standard errors (in brackets) are clustered on the chair judge level in both specifications. Model (2) additionally includes controls for the appellant's country of origin and the legal matter of the case.

**Figure 2.15:** Intention-to-Treat Effect: Substantive Decisions Only



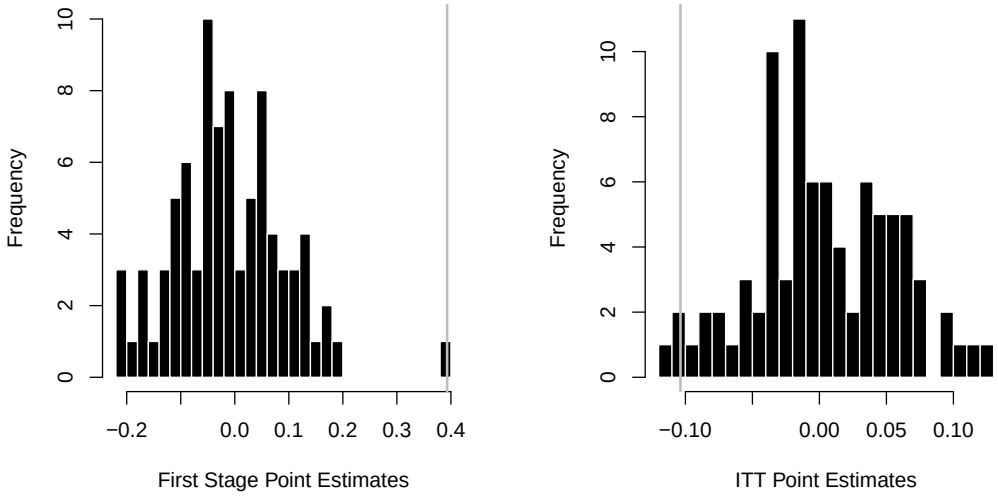

*Note*: The graph displays the ITT effect for the main specification with a donut hole between −40 and +78 days around January 1, 2008 and a bandwidth of 365 days. The points represent average grant rates of appeals binned by submission week with 95% confidence intervals. The lines are fitted with loess, and the dots represent average grant rates of appeals binned by submission week, with 95% confidence intervals.

**Figure 2.16:** Sensitivity Check: Different Bandwidths and Donut Holes (Substantive Decisions Only)




*Note*: These graphs display LATE for compliers point estimates for different bandwidths (left) and differently sized donut holes (right). On the left, the donut hole remains fixed between −40 and +78 days around the cutoff date, as in the main specification. On the right, the bandwidth remains fixed at 365 days, as in the main specification. The light gray shade represents 95% confidence bands, and the dark gray shade denotes 90% confidence bands. In all specifications, I control for chair judge and case language and cluster standard errors on the chair judge level.

**Figure 2.17:** Placebo Test: Point Estimate Distributions (Substantive Decisions Only)




*Note*: These graphs illustrate the distribution of the first stage effect of cutoff distance on the application of the simplified procedure (left) and the ITT effect of the introduction of the simplified procedure on a case's probability of being granted (right) based on the first of each month between March 2008 and January 2015 as the placebo cutoff date. The gray lines represent the corresponding estimates for the actual cutoff date (January 1, 2008). The empirical two-sided $p$-values are .01 for the first stage point estimate and .06 for the ITT point estimate.

# 3

# It's in the News: The Impact of Asylum Issue Salience on Judicial Decision Making

Judith Spirig

While many governments around the globe are struggling to deal with processing relatively high numbers of asylum seekers, asylum and refugee issues have also become one of the top concerns among citizens. This is reflected in the extensive media coverage that asylum policy, refugee arrivals and many other topics pertaining to asylum seekers have received over the last years. How does this high level of attention affect decision makers who are involved in the asylum procedure?

A large volume of literature argues normatively and shows empirically that policy-makers react to public opinion. It is less clear—empirically and normatively—whether judicial decision makers do, too. Using a natural experiment, this paper analyzes empirically whether the extent of media coverage of asylum and refugee issues in Swiss newspapers—taken as a proxy for the extent to which 'asylum' and refugees are considered a (salient) issue among the public—affects Swiss asylum appeal judges' decision making and investigates whether particular topics affect grant rates more than others.

Based on all asylum appeals decided in Switzerland between 2007 and 2015, I show that the effect of newspaper coverage on judges' grant threshold is consistently negative: judges of all parties become more restrictive in times of high media coverage of asylum issues, as do non-partisan judges. This effect is at most partly driven by higher numbers of arriving asylum seekers and, as a topic model approach suggests, more attributable to the coverage of topics that feature citizens' voices (accommodation of asylum seekers) than federal-level asylum policy-making. These findings suggest that issue salience presents a challenge

to the consistency of partisan judges' decisions, especially in times when asylum issue salience and the number of newly arriving asylum seekers are consistently high.

## 3.1 Introduction

In recent years, millions of Syrians, Afghans and Iraqis have fled their homes in search of safety and security—mostly in neighboring countries, but also in Europe. There, the arrival of asylum seekers has caused a stir and led to heated debates. Concurrently with the public salience of asylum seekers and refugees, asylum and immigration issues have become dominant political topics across Europe. Angela Merkel, the German Chancellor, has described the 2015 "immigration crisis" as "the biggest challenge I have seen in European affairs in my time as chancellor,"[1] and UKIP (the United Kingdom Independence Party) claimed during the Vote Leave campaign that only Brexit would allow the U.K. to take back control of its borders.[2]

However, even before what Merkel called the immigration crisis, asylum and refugee issues featured prominently in political discourses across Europe. Combating 'illegal' immigration was a central topic during the 2012 French elections.[3] In 2013, then-U.K. Home Secretary Theresa May piloted a campaign aimed at advising 'illegal immigrants' to leave the U.K.[4] In Switzerland over the last decade, the right-wing Swiss People's Party (SVP) has launched several popular initiatives and referenda to curtail immigration and render the asylum system more restrictive.[5] Asylum and immigration policy has also been extremely prevalent during election campaigns. Representative polls taken at different times in the months leading up to the 2015 Swiss federal elections, for example, show that the issue voters were most concerned about was—by a constant and large margin—'migration, foreigners, integration, asylum and refugees' (Longchamp and Mousson 2015).

Research shows that the simultaneity of the public and political salience of issues

1 See https://www.theguardian.com/world/2015/jun/26/eu-leaders-hash-out-voluntary-system-to-address-mediterranean-migrant-crisis.

2 See, for example, UKIP Leader Nigel Farage speaking at the European parliament in Strasbourg on January 19, 2016: https://www.youtube.com/watch?v=GqdxODwO0oo.

3 See https://www.theguardian.com/world/french-election-blog-2012/2012/apr/19/immigration-forefront-french-election.

4 See https://www.theguardian.com/politics/2013/oct/22/go-home-billboards-pulled.

5 See, for example, https://www.ejpd.admin.ch/ejpd/de/home/aktuell/abstimmungen/2014-02-09.html.

is often not a coincidence (see, e.g., Vliegenthart et al. 2016). Rather, it is not only the case that political debates lead to media coverage, but also that parties and policy-makers respond to public opinion and media coverage (see, e.g., Page and Shapiro 1983; Steinmayr 2016). But what about judges? Do they also respond to issue salience? A small number of studies shed light on the effect of media coverage (Lim et al. 2015; Lim 2015) and public opinion (Epstein and Martin 2010) on judicial decisions, but focus on coverage of judges' decisions or long-term public opinion trends, respectively. Research that investigates the short-term effects of the salience of an issue on judges' decisions is scant. This paper analyzes the effect of newspaper coverage of asylum issues on judges' asylum appeal decisions and thereby addresses this gap in the literature.

Several features of the Swiss Federal Administrative Court (FAC) asylum divisions render it a suitable and interesting case for the analysis of the effect of issue salience on judicial outcomes. At first glance, we might not expect asylum judges to be influenced by asylum issue salience. They are experts in asylum law, are experienced in deciding vast numbers of low-salience asylum appeals and are required by law to do so "independently", "bound only by the law"[6] and treat everyone "equal[ly] before the law"[7].

Yet, a closer look reveals that there are a number of institutional particularities that combine to create a context in which judges' reactions to asylum issue salience are likely to occur. First, in the Swiss system, federal (administrative) judges are elected by the United Federal Assembly (the two houses of the Swiss parliament), and their candidacies are supported by their respective MPs. It is an informal requirement to join (or at least support) a party before running for judicial office.[8] Party affiliation is one of the factors determining whether someone will be proposed for election and is thus one of the most salient aspects of a candidate's profile. Even beyond the election, judges' party affiliations are noted on the court's web site. Due to the high political salience of asylum issues

6 Cf. Article 2 of the Swiss Administrative Court Act. The full article is: "The judicial authorities are independent in the exercise of their judicial powers and are bound only by the law."

7 Cf. Article 8(1) of the Federal Constitution of the Swiss Confederation.

8 Section 3.3.2 will elaborate more on judicial elections and on why not all judges are party members.

and the judicial selection system are central factors in the analysis of the effect of asylum issue salience on judicial decision making.

Second, the FAC is the court of first and last instance for asylum matters in Switzerland. As a consequence, with very few exceptions, only the European Court for Human Rights can reverse decisions made by FAC asylum judges. This implies that asylum judges are therefore largely unconstrained by a higher court. Third, the selection of judges for panels and positions within panels is conducted by software specifically developed for the FAC.[9] The assignment is, conditional on a few observable criteria, as-good-as random and thus independent of a case's merit. This allows for a credible identification of judges' grant rates as a reflection of their preferences relative to other judges. Finally, unlike other contexts and areas of law, newspaper coverage of asylum issues is largely exogenous to appeal decisions. Accordingly, asylum issue salience is unlikely to be caused by judges' actions. As a consequence of these factors, the temporal variation in asylum issue salience facilitates a credible estimation of the effect of issue salience on judges' decision making in a context where it is more likely to occur than in others.

The data used in this study stem from two main sources. The asylum appeals dataset was obtained from the FAC and covers the complete set of asylum appeals decided in Switzerland between January 2007 (when the court was set up) and December 2015. It includes information on the verdict, the judges on the panel, the date of the decision, the appeal date and several other variables. This dataset was merged with information on judges (most importantly party affiliation) that was obtained from the court's web page for active judges.[10] The asylum issue salience dataset details newspaper coverage of asylum and refugee issues. By measuring issue salience with media coverage, it builds on previous research (Epstein and Segal 2000; Grossman 2015). However, rather than restricting the analysis to one newspaper, I collected all articles on asylum issues from 18 major Swiss newspapers. The dataset consists of about 36,900 newspaper articles published between January 2007 and December 2015 and includes, among other

9 This software, called 'Bandlimat', is how the FAC ensures compliance with art. 30 par. 1 of the Swiss Constitution. For more information, see Schuppisser (2007).

10 Note that in agreement with the FAC, which provided the data, judges will not be identified by name.

information, the full text of the article, publishing date and the newspaper it was published in.

Using a series of logistic regression, generalized additive logistic and linear probability models, I gather robust evidence that higher asylum issue salience leads judges to decide asylum appeals less favorably. Depending on the specification, the average grant rate drops by between two and seven percentage points when median media coverage increases by one standard deviation. Despite the importance of party membership in the judicial selection procedure, there are no statistically significant differences between judges of different parties and non-partisan judges.

This effect is at most partly driven by higher asylum application numbers and, as a structural topic model analysis of the German-language asylum coverage subset suggests, is actually related mainly to topics that frequently feature citizens' voices (such as the accommodation of asylum seekers and refugees) rather than asylum policy-making and election campaigns. Although documented in a context in which they are perhaps likely to occur, these findings have implications for the consistency of judicial decision making and point toward the power of the media and voters in shaping judicial outcomes in the asylum appeal context.

The remainder of the paper is organized as follows. After Section 3.2 situates this study within existing research and elaborates on the focus on judges' party affiliation, Section 3.3 outlines the asylum coverage dataset and introduces relevant aspects of the Swiss asylum appeal system. Sections 3.4 to 3.6 constitute the empirical part of the paper. They present the empirical strategy, which relies on over-time variation in the salience of asylum issues as the main independent variable, and show that higher issue salience leads to more restrictive asylum appeal decisions. In a second step, an analysis of the topics covered in newspaper articles on asylum issues lends credibility to the interpretation that the salience effect could be mediated by a (subconscious) short-term hardening of judges' attitudes toward asylum seekers. Finally, the conclusion (Section 3.7) highlights the importance of these findings in times of consistently high asylum issue salience and asylum request numbers. The Appendix provides additional information on robustness checks, the media coverage corpus and further supporting tables and figures (Sections 3.A – 3.C).

## 3.2 Judges and Decision Making

Issues pertaining to asylum seekers and refugees have often triggered heated debates among voters. After the attacks in Paris in November 2015, for example, British voters appear to have become less favorable toward refugees from Syria.[11] In Switzerland, local opposition to the reception of asylum seekers in Swiss municipalities has frequently been intense and outspoken.[12] Past research has shown that political elites respond to issue salience (see, e.g., Epstein and Segal 2000) and public opinion (Page and Shapiro 1983), and has considered accountability of policy-makers to voters an important criterion for the quality of politicians and government (see, e.g., Adsera et al. 2003; Key 1961). Accordingly, politicians' reactions to asylum issues in times of high salience are expected. Yet, whether judges react to issues that are highly (publicly and politically) salient and which factors mediate such an effect, remains largely unknown. This paper investigates the impact of issue salience on judges' decisions and thereby pays attention to the (institutional) context of judicial decision making. In this respect, both the judicial selection procedure and the field (here asylum issues) within which the cases are embedded play a role.

What research has shown, however, is that judges are not simply 'the mouth of the law'.[13] Rather, there are different sets of factors beyond the merit of cases that interact with each other and affect judges' decisions. A sizable number of studies show how judges' identities influence case decisions (Boyd et al. 2010; Gazal-Ayal and Sulitzeanu-Kenan 2010; Glynn and Sen 2015; Grossman et al. 2016; Kastellec 2013; and, with regard to asylum adjudication, Ramji-Nogales et al. 2007; Taylor 2007). In sum, they suggest that, at least under some circumstances, the decision makers matter to a case's outcome: whether it is that black judges vote differently than white judges in affirmative action cases (Kastellec 2013) or female judges differently from male judges in sex discrimination cases (Boyd et al. 2010), a consensus has emerged that aspects of a judge's identity

11 November 2015 YouGov poll: https://yougov.co.uk/news/2015/11/18/brits-less-accepting-syrian-refugees-wake-paris-at/.

12 See, for example, here: http://www.weltwoche.ch/ausgaben/2014_34/artikel/die-grillparty-bewegung-die-weltwoche-ausgabe-342014.html.

13 Originally in French 'la bouche de la loi', quoted, for example, in Dyevre (2010).

that are somehow connected to the case at hand can play a role in the decision of the case. Due to the high political salience of asylum and refugee issues, judges' 'political', ideological identity is particularly relevant for the purpose of this study. Like other aspects of judges' identity, past research suggests that judges' ideology matters for case outcomes—arguably more so in ideologically contested areas of the law (see, e.g., Sunstein et al. 2007).[14]

Yet, at the same time, judges are not exclusively driven by their identities in the sense that they always vote according to their personal, ideological preferences or with people of their own race or gender.[15] Rather, like ordinary citizens, they have also been found to be strategic actors who are embedded in a specific set of institutions (see, e.g., Epstein et al. 2013). Research shows that they aim at reducing workload (Epstein and Knight 2013) and the probability of reversal (Songer et al. 1994) and respond to incentives created by the judicial selection procedure (see Lim et al. 2015). Whereas many of these factors can influence judges' decision making either consciously or subconsciously, several studies document the impact of subconscious processes. Beyond being more lenient after food breaks (Danziger et al. 2011), judges tend to avoid long strings of identical decisions (Chen et al. 2016) and can be influenced by their implicit racial biases in the absence of measures guarding against them (Rachlinski et al. 2008).

Past research also suggests that judges do not operate in isolation from public life. A number of studies shed light on courts' or judges' relationships with the public and investigate the influence of the media, public opinion or issue salience on judicial outcomes. On the one hand, this strand of research includes studies of whether U.S. Supreme Court decisions reflect (and influence) broad, long-term trends in public opinion (Casillas et al. 2011; Epstein and Martin 2010; Giles et al. 2008; Hall 2014; Hoekstra 1995). On the other hand, it focuses on how judges change their decision making when the court's decisions are more exten-

14 Note that ideology and other aspects of judges' identity often cannot be analyzed completely separately from each other since certain characteristics and preferences often correlate strongly with judges' ideology.

15 There is a long debate in judicial politics as to whether judges' decisions are driven purely by their personal attitudes, by their ideology, solely by the legal facts of a case or by their strategic behavior, which I will not delve into for the purpose of this paper. For an overview, however, see for example Segal and Spaeth (2002).

sively covered in the media (Lim et al. 2015). While causal effects of public opinion on courts' decisions (and vice versa) are challenging to estimate, Lim et al. (2015) provide causal evidence that more coverage of judges' decisions influences their decision making in criminal law cases, if judges are non-partisan and elected in popular votes. Taken together, these studies suggest that judicial decision making is not completely detached from long-term public opinion trends and that, under certain conditions, media coverage has an impact on judges' decisions. In addition, specifically with regard to issue salience, there are—to my knowledge—two papers that investigate its effect (in the sense of exogenous variation of public attention toward a broader issue) on judicial outcomes: Epstein et al. (2005) find that during times of war, Supreme Court Justices curtail rights and liberties in cases unrelated to war, but not in those related to war, and Shayo and Zussman (2011) show that higher local terrorism intensity in Israel leads to an increase in judicial in-group bias.

What implications do these insights from the literature on the impact of extra-legal factors on cases' outcomes yield for the context of asylum appeal decisions in Switzerland? Where documented, the effects of media coverage on judicial decisions at lower courts were restricted to jury members (Lim 2015) and elected non-partisan judges (Lim et al. 2015).[16] Whereas jury members are not legal experts and might thus rely on any information available to them, the effect of media coverage on elected non-partisan judges is explained by the interaction between the judge selection system and media coverage. When judges are elected in non-partisan elections, the harshness of judges' decisions (in criminal sentencing) provides relevant information for voters. However, in partisan elections, the party cue is so strong that it outshines other information and thus neither has an influence on voters' choices nor constrains judges. Thus, both of these findings suggest that asylum issue salience does not influence judicial decision making in the Swiss context, where asylum judges are predominantly partisan, elected by the national parliament and experts in asylum law.

Shayo and Zussman's (2011) study, however, highlights another relevant di-

16 Even though the Swiss FAC is not a lower court, it shares several aspects with typical lower courts, most importantly, that most of its asylum appeal decisions do not display a high legal salience and are often very similar in terms of the legal aspects that they deal with.

mension. By providing evidence that higher local terrorism intensity increases in-group bias in judicial decisions in Israel, they point to judges' social group membership as a mediating factor. Combined with insights from the literature on effects of judges' identities, these findings imply that higher asylum issue salience could amplify judges' political identities. As illustrated in Chapter B 1, judges' political preferences arguably play a role in asylum appeal decision making at the FAC, irrespective of the short-term intensity of asylum issue salience. This might not be surprising given both the generally rather high political salience of asylum issues and the politicization of the judicial selection procedure: when running for office, judges' candidacies generally have to be supported by a party that is represented in the Swiss parliament. In practice, this also means that judges are normally party members (or at least supporters). The situation at the FAC asylum divisions is a bit different from that of other divisions, in that the asylum divisions have (or at least once had) a considerable share of non-partisan judges. This particularity is due to an informal agreement in the election of judges to the first FAC. Judges employed at the Swiss asylum appeal commission (AAC) were nominated and elected, even if they decided not to become party members.[17]

The implicit rule, however, to elect judges approximately proportionately to the strength of parties in the federal assembly is in a sense a tribute to the fact that judges' identities matter. Rather than being a byproduct of Switzerland's federal judges selection system, judges' party membership is seen as a way to make the bench representative of the broader 'socio-political forces' in Switzerland (Raselli 2011, 5). As Chapter B 1 shows, Swiss asylum judges' individual preferences correlate with their party affiliation in expected ways, with the left-wing Social Democrats (SP) and Green Party (GPS) judges being more favorable toward appellants and the right-wing Swiss People's Party (SVP) judges displaying more restrictive asylum preferences.[18] This suggests at a minimum that judges do not randomly select into parties when running for office, and taking into account

17 The AAC was the entity tasked with deciding asylum appeals before the FAC came into existence in 2007. Since the commission was organized bureaucratically, judges were employed within the Federal Department of Justice and Police and not elected by the federal assembly.

18 Figure 3.9 in the Appendix displays MPs' preferences aggregated into party ideal points and illustrates these 'expected ways'.

that asylum issues are one of the most relevant dimensions along which parties differentiate themselves from one another, that judges' party membership can be considered a crucial aspect of their judicial identity. Thus, despite judges' expert knowledge of asylum law, the political salience of asylum issues and the relevance of party affiliation in the judicial selection procedure provide a context in which we can expect judges to respond to issue salience.

Beyond the importance of the institutional setting, taking seriously that "judges are people, too" (Clark et al. forthcoming) necessitates the consideration of insights from the literature studying the effects of immigration—and the arrival of refugees more specifically—on the general public's attitudes toward immigrants. The consensus emerging from this literature is that natives become on average more anti-refugee when the number of refugees increases (Dustmann et al. 2018; Hangartner et al. forthcoming; Steinmayr 2016), especially if personal contact is rare. In addition, findings from Dustmann et al. (2018) also support the notion that judges' party affiliation might be a crucial factor in moderating the effect of asylum issue salience on decision making: They find that pre-existing political attitudes moderate the effect of refugee arrival on attitudes toward refugees (Dustmann et al. 2018).[19] Hopkins (2010) investigates issue salience as a moderator for attitudes toward immigrants in response to an increase in the number of local immigrants. Studying the case of the U.S. after 9/11 and the resulting sudden increase in media attention toward immigrants, he finds that high issue salience leads to more negative attitudes toward immigrants in response to an increase in the number of immigrants (Hopkins 2010, 44):

> at times when rhetoric related to immigrants is highly salient nationally, those witnessing influxes of immigrants locally will find it easier to draw political conclusions from their experiences.

Accordingly, research on the effects of immigration on natives' attitudes suggests not only that an increase in the number of refugees but also in issue salience lead to more restrictive attitudes with regard to immigrants—potentially moderated by pre-existing political attitudes.

19 Danish municipalities with a larger share of people who pay church tax and cities exhibit lower shifts in votes for anti-immigration parties in response to an increase in the share of refugees.

In sum, a vast literature has shown that judicial decision making is influenced by factors that go beyond the merit of a case. Both conscious and subconscious processes lead judges to reach decisions that are affected by who made them and the context within which they are reached. Thus, on the one hand, whether or not judges respond to issue salience depends on a variety of factors, among them potentially the judicial selection process. Another strand in the literature has shown that voters often become more anti-immigrant in response to an increase in immigration, moderated—among other factors—by pre-existing political preferences and issue salience. At the intersection of these research avenues, several gaps remain: Do judges respond to issue salience, even if they are experts in their field? Are pre-existing political beliefs a moderating factor in the effect of issue salience on judicial decisions? By connecting the exogenous variation in issue salience to the larger debate on judicial behavior, this study adds to the literature on the effects of court-exogenous factors and provides insights into the study of the effects of judges' identity on case outcomes, particularly in politically salient fields of law. In addition, it bridges the gap between the work on judicial behavior and natives' immigration attitude formation by studying a particular sub-group of citizens who are expert decision makers.

One of the reasons why the questions above have gone largely unanswered thus far is the empirical challenge involved in researching the effects of issue salience. In order to provide reliable estimates, high-frequency data for both issue salience and outcome are key. Drawing on a large dataset of newspaper articles and individual-level asylum appeal decisions, this paper addresses some of these challenges and analyzes the effect of newspaper coverage of asylum issues on asylum appeal decisions.

## 3.3 Setting and Data

This section provides background about the Swiss asylum appeals system, the broader political context and the measurement of asylum issue salience. In addition, it presents information about the two sets of data used in this paper: data on newspaper coverage of asylum issues and a dataset of all asylum appeal decisions made at the Swiss FAC between 2007 and 2015.

### 3.3.1 Newspaper Coverage of Asylum Issues

*Issue salience* has become associated with several concepts in judicial politics. On the one hand, it is used as a measure of the legal salience of a case—how judicial decision makers view the legal importance of the case they are deciding, whether at the time when they are making the decision or retrospectively (see, e.g., Epstein and Segal 2000). On the other hand, and not restricted to judicial politics, it refers to how important voters think a certain issue is (Wlezien 2005; Collins and Cooper 2012) or how concerned they are about a certain issue.[20] In this paper, issue salience refers to how much public attention is devoted to an issue, thereby following closely the definition laid out in Wlezien (2005) and Collins and Cooper (2012). To measure it, this study uses the amount of newspaper coverage of asylum issues. In the case of asylum, a highly politicized issue in Switzerland, I argue that this captures both how important an issue is to voters and how it can also be understood as an expression of concern about an issue.[21] Unlike other research on the effect of media coverage on judicial decision making that focuses on newspaper coverage of courts and judges' decisions (see, e.g., Lim et al. 2015), newspaper coverage of asylum issues is not driven by asylum judges' decisions, but rather is a reflection of the public salience of the issue (see Figure 3.1).

Newspaper articles—instead of TV reports or social media, for example—were chosen for several reasons. First, newspapers are still a crucial means of information and entertainment in Switzerland: according to a study from 2010, 97% of residents read the newspaper have at least once in 2008 (Vanhooydonck and Moeschler 2010). Politicians arguably also attribute a high political relevance to newspapers: who is in charge of which newspapers and how they are connected to parties and politicians have been contested and received widespread attention

20 For a more in-depth discussion about how to measure this based on public opinion and the challenges emerging from using the 'most important problem' question, see Wlezien (2005).

21 This interpretation is supported by pre-election surveys that suggest a jump in the proportion of voters that consider 'migration, foreigners, integration, asylum and refugees' the most pressing problem in Swiss politics between June 2015 and August 2015 (from 34% to 46%)—while a large increase in the number of newspaper articles (in the collected dataset) occurred: from 275 articles in June 2015 to 447 articles in August 2015.

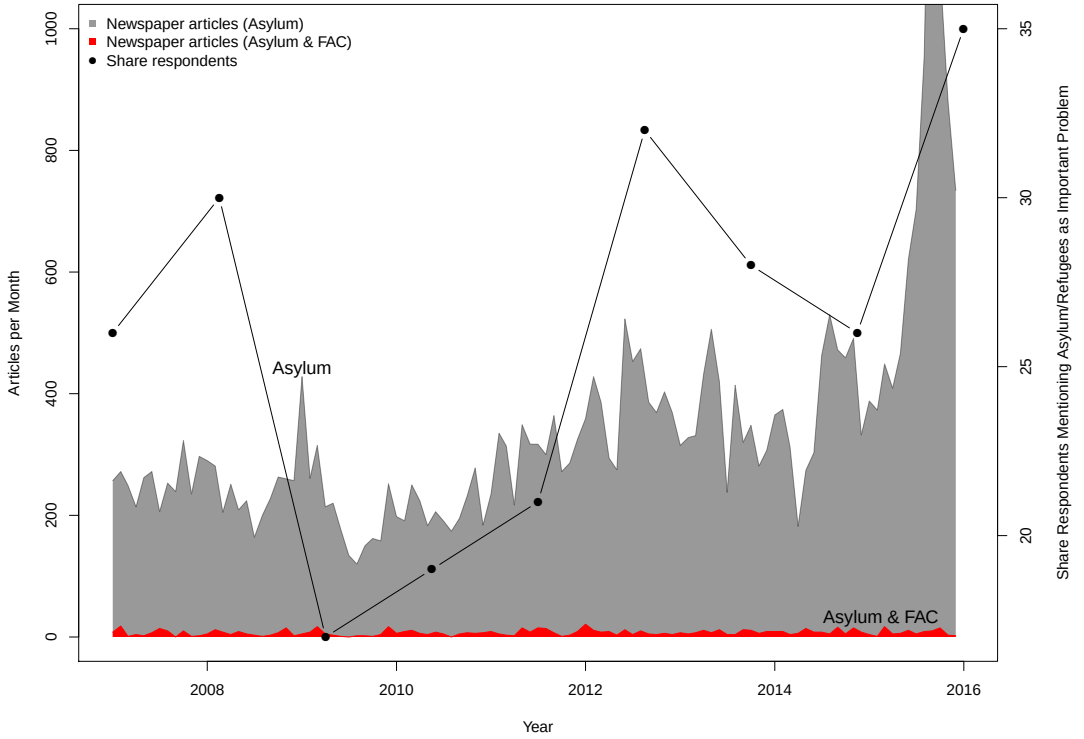
in Switzerland in recent years.[22] Second, media coverage of a given issue has been used as a measure for issue salience in the context of judicial politics before (initially suggested by Epstein and Segal (2000)), though that was in regard to the salience of a particular case to Supreme Court judges. Third, representative public opinion polls that cover asylum issue salience are not carried out on a daily, weekly or monthly basis, but mainly only in months leading up to national elections. In contrast, media coverage of asylum issues can be measured on a daily basis. Yet, while public opinion polls cannot be used to measure issue salience on a high-frequency level, they support the interpretation of issue salience as indicating both the importance of an issue and the extent to which it is perceived as a problem: the correlation between the share of people who understand asylum and refugees to be one of the top five problems,[23] and the yearly number of newspaper articles on asylum issues is 0.73. Finally, through global news databases, it is possible to access and download the digital version of articles of a sizable fraction of Swiss newspapers during the study period.

The newspaper articles that form the corpus were collected via Factiva. Factiva covers an extensive set of Swiss daily and weekly newspapers, from the German, French and Italian parts of the country. I searched the database with the string ((‘asylum*’ OR ‘refuge*’) AND ‘Swi(tzerland|ss)’ OR ‘canton’)) in German, French and Italian and downloaded all articles that contained the string between January 1, 2007 (the first day of the court’s existence) and December 31, 2015. I then narrowed the sample down to articles from newspapers that were completely available over the study period. The final dataset covers eighteen newspapers, of which five are in French and thirteen are in German. Among them are seven of the ten most widely circulated daily newspapers, the three most widely circulated Sunday newspapers and two influential weekly news magazines. To account for the relative influence of newspapers, the trimmed sample that consists of about 36,900 articles was merged with 2009 circulation

22 The former president of the Swiss People’s Party (SVP) and federal councillor (Christoph Blocher), for example, owns a third of the *Basler Zeitung*, one of the larger daily Swiss newspapers. Roger Köppel—publisher of the conservative-right weekly magazine *Die Weltwoche*—was elected as MP for the SVP in 2015 after having just entered politics.

23 The exact question is: “On these cards you see several topics that have been frequently discussed and written about. Please look at all of them and take the five that you personally think are the five biggest problems in Switzerland.” (Golder and Longchamp 2016).

**Figure 3.1:** Monthly Circulation-Weighted Number of Articles on Asylum Issues




*Note*: The graph displays the number of published articles on asylum issues in selected Swiss newspapers (see above) per month during the study period. These numbers are weighted by circulation (data from 2009). Data on the share of respondents mentioning asylum and refugee issues as one of the most important five problems in Switzerland is taken from Golder and Longchamp (2016).

data from WEMF AG für Werbemedienforschung (2010). The topic model analysis draws on the German-language subset of this corpus, which covers around 25,000 articles.[24] Figure 3.1 provides an overview of the temporal distribution of the articles over the study period and shows that there is sizable variation in asylum issue salience over time. It also shows that the coverage of asylum issues is not driven by judges' decisions: the subset of articles that include the word 'federal judge', 'asylum judge' or 'federal administrative court' is small. This supports the assumption that the number of articles published on asylum issues is orthogonal to judges' decision making.

24 Note that the correlation between the monthly number of newspaper articles in the whole dataset and the German subset is .99. See Appendix Section 3.B for further information on how the corpus was assembled and processed.

### 3.3.2 Asylum Appeals Procedure and Data

#### The Swiss Federal Administrative Court

The Swiss FAC, including its two asylum divisions, has existed since January 2007.[25] Ever since, all appeals lodged against the Swiss Secretariat for Migration (SEM)—the government's migration agency that decides asylum requests—with regard to asylum issues have been handled by the FAC asylum divisions. The appeals deal with a variety of questions (denied entry to Switzerland to request asylum, initial asylum decision, removal, cancellation of asylum status, procedural issues during asylum process, etc.), but are exclusively about asylum matters and of SEM decisions or previous FAC rulings. Thus, the approximately thirty judges within the FAC asylum divisions have solely and exclusively handled all Swiss asylum appeals since 2007. The FAC asylum divisions' judgments are generally not appealable to a higher court in Switzerland.[26]

FAC judges are elected into judicial office by the United Federal Assembly, a joint assembly of both houses of the Swiss parliament (the National Council and the Council of States). The federal assembly's judicial committee screens and interviews potential candidates for the position of federal (administrative) judge.[27] Selected candidates are then presented to the relevant parliamentary factions and usually only nominated if backed by the party of which they are members or (rarely) supporters. Even though a number of non-partisan candidates were elected into office in the first-ever FAC judge elections in 2005 because of their previous appointment to the Swiss Asylum Appeal Commission, almost all judges are members (or at least supporters) of the larger parties represented in the parliament. This is not uncommon in Switzerland and is connected to the idea that courts should be representative of Swiss society in terms of its socio-political views (see, e.g., Raselli 2011). In practice, with regard to the

25 Before 2007, appeals lodged against the SEM's predecessor were handled by mostly the same judges, but at the Swiss Asylum Appeal Commission, a government agency embedded within the Federal Department of Justice and Police.

26 The next higher instance is the European Court of Human Rights, which takes on only an extremely limited number of cases.

27 The only requirement is that the candidate has the right to vote at the national level (i.e., is a Swiss citizen over the age of 18). However, only candidates with legal expertise have ever been considered (Marti 2010).

election of federal judges, this translates into the informal rule that the relative strength of the parties in the federal assembly is reflected in the composition of the court.[28] Judges are elected for terms of six years and can be reelected for an unlimited number of times until the age of 68. Reelections are essentially uncompetitive retention elections—no federal judge has ever not been reelected, and there are no alternative candidates.

### The Appeal Procedure

Once an asylum appeal is lodged and received by the FAC, the court's central chancellery assigns it to one of the two asylum divisions. Conditional on a few criteria that are exogenous to the merit of the appeal,[29] software randomly chooses judges for positions on a three-judge panel: chair, second and third judge. In other words, conditional on a few criteria, judges are as-good-as randomly assigned to positions on three-judge panels—in expectation, independently of an appeal's merit. The chair judge's role is similar to the role of an opinion writer, as she is the one who receives the complete case file first.[30] In a first step, she decides whether the appeal fulfills the formal requirements and should receive a substantive decision. If not, she rejects it 'without entering into the substance of the case'. If it does fulfill the formal requirements, she then potentially acquires additional material and finally produces a draft of the panel's decision. This draft is then circulated—together with the case file—to the second and the third judge, who can note disagreements and propose changes; however, they cannot come up with a dissenting opinion. In case of disagreements, the draft is amended and circulated again. If a consensus cannot be reached, the panel resorts to a simple majority vote. Against the backdrop of this system, it is perhaps not surprising that we find that the best simple aggregation rule to explain how judges combine their individual preferences into a joint panel decision is the

28 The relative underrepresentation of the right-wing Swiss People's Party (SVP) at the FAC asylum divisions, for example, has been criticized by SVP politicians repeatedly, although the underrepresentation is more likely due to a lack of SVP candidates than to their candidates not being elected (see, e.g., Odermatt 2007).

29 Without going into too much detail—see Chapter B 1 for a more detailed description of the procedure—the criteria are language of the appeal document (German, French, Italian), the judges' working language(s), urgency of the appeal and judges' workload.

30 Note that each judge has several clerks at her or his disposal.

'chair-as-dictator' model (see Chapter B 1). While a mixture model of 'chair-as-dictator' and 'median-is-decisive' is the best-fitting aggregation rule overall, this paper relies on the best simple model for two reasons: first, because the chair-as-dictator model constitutes a reasonable approximation of the best-fitting, but more complex, mixture model, and second, due to missing second and third judge data in some years.[31]

Since 2008, as a consequence of a change in the Swiss asylum law, the chair judge is not only the one who drafts the decision, but also the one to decide whether a case is handled under the ordinary procedure described above or by a simplified procedure. If the chair judge finds the appeal to be 'clearly with or without merit', she invokes the simplified procedure. As a consequence, the third assigned judge is released from duty and the case is decided by the chair judge with only the consent of the second judge.[32]

### Appeals and Judges Data

As stipulated by article 6 of the Informations Regulations of the Federal Administrative Court, the FAC publishes anonymized versions of almost all substantive decisions (i.e., most cases processed under the ordinary or simplified procedure) online on its web page.[33] Appeals that were dismissed 'without having entered into the substance of the case' (for example, because an advance on costs was requested and not paid in time) or that were 'written off' do not enter the publicly accessible web page. To construct a dataset of all publicly available decisions, Hangartner et al. (2018) collected all asylum appeal decisions from the FAC's online database and extracted the key variables of the decisions: the unique case id, the date of appeal submission, the names of the judges on the panel, the date and the language of the appeal decision, the appellant's country of origin, (possible) legal representation and the verdict itself. They then merged this dataset with the complete set of cases obtained from the FAC. The data obtained from

31 See Chapter B 1 for more information about aggregation rules.

32 If the second judge substantially disagrees with either the draft or the fact that the case is 'clearly with(out) merit', the ordinary procedure is invoked. For more detailed information about the procedures, see Chapter B 2.

33 See http://www.bvger.ch/publiws/pub/search.jsf.

the FAC covers the universe of decisions reached by the FAC asylum divisions, including the unpublished decisions. In total, the dataset spans 41,040 appeals decided between January 1, 2007 and December 31, 2015, of which about 64% were written in German, 31% in French and 5% in Italian. For the purpose of this paper, I drop all cases submitted before 2007, because they were assigned to judges through a system other than the one used since the inception of the court in 2007. Furthermore, I consider unified cases as one case, because they were handled by the same judges and received the same verdict. Finally, cases that were written off are also disregarded, because they did not receive a substantial decision.[34]

The appeal verdicts are coded as 'rejected' or 'granted' if the substantive (content) part of the appeal was rejected or granted, respectively. In other words, everything that pertains directly to the asylum seeker's situation is considered *substantive*, while issues that pertain to the procedure, such as questions of legal aid, are not. For example, if an appeal was rejected insofar as it concerns the asylum seeker's asylum claim and protection from having to return to her country of origin, but was granted insofar as it concerns her request to receive free legal representation, the case was considered 'rejected'. The cases in which the appellant partly won (focusing on the substantive part) are considered 'granted', because partly granted appeals may still lead to an improvement in the asylum seeker's situation.[35]

Along with the information about which judges contributed to a decision (see above), the dataset also contains biographical information about the judges. For active judges, this information is available on the court's web page and includes characteristics such as date of birth, place of birth, education and previous jobs, date of election to the court and—most importantly for the purpose of this

34 See Chapter B 1 for further information on the construction of the dataset and the coding of variables.

35 For example, 'partly granted' can mean that an appellant receives temporary protection in Switzerland, but that the appeal is rejected insofar as it concerns refugee status. Among other reasons, this situation arises because appellants often appeal different aspects of the first-instance decision. In the full dataset consisting of over 40,000 cases, this outcome involves about 2.5% of all cases.

paper—party affiliation.[36]

## 3.4 Empirical Strategy

As discussed in the previous section, drawing on the finding from Chapter B 1—that the chair judge essentially rules as 'dictator'—this analysis focuses on the panel's chair judge. Accordingly, in the main analysis, I regress the probability of an appeal to be granted ($\pi_i$) on the average number of newspaper articles on asylum and refugee issues published during the appeal's decision-making period (*Coverage*). To model the dichotomous outcome ('granted', that is underlying $\pi_i$), I use a binary logistic model.[37] In a second step, taking into account that judges' party affiliation might interact in relevant ways with *Coverage* (see Section 3.2), I regress the probability of an appeal to be granted on the interaction of *Coverage* with the chair judge's party:

$$logit(\pi_i) = \alpha_j Coverage_i + Judge_j + Language_i + Quarter_i + \epsilon_i \tag{3.1}$$

$$logit(\pi_i) = \beta_j Party_j + \alpha_j (Party_j \times Coverage_i) + Language_i + Quarter_i + \epsilon_i \tag{3.2}$$

where $Party_j$ is the party of which the chair judge deciding case $i$ is a member, $Coverage_i$ is the intensity of asylum issue salience of case $i$ and *Language* and *Quarter* are fixed effects for case language and each quarter-year, respectively. In Equation 3.1, I also include a chair judge fixed effect (*Judge*). Since judges do not change party affiliation, no chair judge fixed effects are included in Equation 3.2. Note that I do not include a constant in order to estimate all *Party* fixed effects and also omit *Coverage* so that I have all interactions between *Party* and *Coverage* in the model (see the following tables).

To quantify media coverage of asylum issues, I use two different measures:

36 See, for example, the judges of Division IV, https://www.bvger.ch/bvger/en/home/about-fac/judges-and-court-clerks/judges/judges-division-iv.html. Note that in agreement with the court, none of the research produced with their data will identify judges by name.

37 But see Figure 3.2 for results from a linear probability model.

i) The circulation-weighted average daily number of articles on asylum issues, published in a set of Swiss newspapers *during the whole period* of the asylum appeal decision procedure. I fix the maximum number of *Coverage* at 60 in the main regression to ensure that the results do not depend on outliers with values over 60 (the maximum average daily coverage is 84). The benefit of averaging over the whole decision-making period is that it accounts for the fact that it is unclear at what point in time the decision was actually made. Yet, at the same time, it is a downside of this measure that only cases that are decided within a very short period can reach extreme values of *Coverage*.

ii) The circulation-weighted average daily number of articles on asylum issues *during the last month before* a decision was made, i.e., is finalized. Focusing on the last month before a decision was made provides a lower bound to the effect of issue salience, because in the absence of the exact date on which a case was actually, internally, decided, it is possible that the actual decision was reached before the last month (a fourth of cases take 300 days or more to decide) and was therefore unaffected by issue salience in the month before the decision is finalized.

Since both measures have advantages and disadvantages, I will perform the main analysis for both definitions of *Coverage*, to indicate—in a sense—a lower and an upper bound for the effect of asylum issue salience on judges' grant rates. In addition, as Appendix Section 3.A discusses in more detail, I perform a variety of robustness tests, including further transformed versions of *Coverage* as independent variable (see also the estimates in Figure 3.2), to support the validity of the main results.

I include *Quarter* fixed effects, in order to adjust for general changes in the court's grant rate over time. There are many sources of potential variation that could impact on either the average merit of cases or the threshold that judges apply to decide which case is 'strong enough' to be granted (however, not necessarily their relative threshold): the situation in appellants' countries of origin, changes in the SEM's initial decision making or changes in appellants' decision making (to

lodge an appeal or not), among others.[38] *Language* fixed effects for the language of the asylum appeal decision (which is the same as the language of the decision against which the appeal is lodged) are employed, because case language affects the assignment of judges to cases.[39] Underlying $\pi_i$, the probability of a case to be granted, is whether a case was granted or rejected. As laid out in the previous section, decisions are coded 'granted' if the substantive part of the appeal was at least partly granted and 'rejected' otherwise. Finally, a comment on appeals' independence is in order. There are cases (usually lodged by different family members) that keep their unique case number but are unified and receive a joint decision made by the same panel. I address this challenge in two ways. To account for possible non-independence between decisions, I treat unified cases as one single case, and, in addition, estimate all regressions with standard errors that are clustered on the chair judge level.

## 3.5 Results

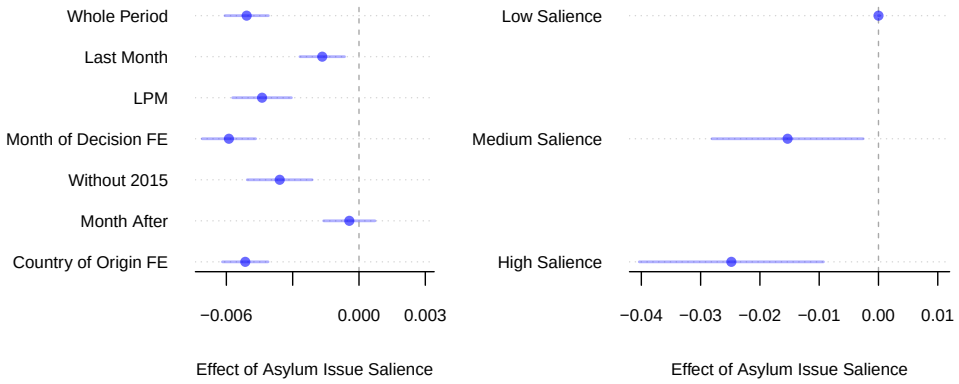
### 3.5.1 Effect of Asylum Issue Salience

This section first presents the results from the main model, as laid out in Equation 3.1, followed by results from a number of robustness tests. I estimate the 'overall' effect—without interacting *Coverage* with the chair judge's party—of asylum issue salience on asylum judges' grant rates, with *Coverage* both measured during the whole decision-making period (Column (1) of Table 3.1) and the month before the decision was finalized (Column (2) of Table 3.1). The point estimates indicate that there is a substantial negative effect of asylum issue salience on an appeal's probability of being granted. The estimates are

38 An additional robustness test present results from a model that includes month fixed effects, which allows for a very flexible time trend absorbing these 'shocks' to judges' decision making and a generalized additive logistic model that includes a very flexible time trend instead of quarter fixed effects. The results remain stable. See Section 3.A for more details.

39 Judges are assigned to appeals conditional on the complementarity of their language skills and the language of the initial decision against which the appeal is lodged. If a certain subset of asylum seekers receive decisions in one language more frequently, this could influence the set of cases to which a given judge is assigned.

**Figure 3.2:** Results




*Note*: The left graph presents estimates for the effect of asylum issue salience from the main model as laid out in Equation 3.1, with *Coverage* measured during the whole decision-making period ('Whole Period'), during the month before a decision was finalized ('Last Month'), estimated with a linear probability model instead of a logistic regression ('LPM'), with month fixed effects instead of quarter fixed effects (Month of Decision FE), with *Coverage* measured during the month after a decision was finalized ('Month After'), for the period of 2007 to 2014 ('Without 2015') and with an additional control for appellants' country of origin ('Country of Origin FE'). Note that with the exception of 'Last Month' and 'Month After', all specifications in the graph on the left-hand side have *Coverage* measured during the whole decision-making period. All estimates are average marginal effects with standard errors clustered on the chair judge level and 95% confidence intervals. In the graph on the right-hand side, *Coverage* is a categorical variable with low, medium and high coverage during the whole decision-making period.

average marginal effects and can therefore be interpreted in a straightforward manner: the coefficient of $-0.005$ ($-0.002$) implies that on average, the probability of a case being granted decreases by 0.5 (0.2) percentage points with one more 'article' published on asylum issues per day during the asylum appeal decision-making period (the month before the decision). Even though this might appear to be a small effect, given that mean *Coverage* is 14 (median: 12), that is actually a substantial, negative effect: a one standard deviation increase in *Coverage* leads to between two and seven percentage points' decrease in a case's probability of being granted, depending on the measure for *Coverage* used.

In addition to a visualization of the estimates for the effect of asylum issue salience based on the main specification (with *Coverage* measured during the whole decision-making period or the last month before decision finalization), Figure 3.2 also displays the results from a number of robustness tests. As more extensively discussed in Appendix Section 3.A, I conduct several robustness tests

to support the validity of the main results.[40] First, to address the worry that changes in the composition of appellants, their countries of origin or the quality of their appeals could be different in times of higher issue salience, I adapt the main specification a) to include month fixed effects (instead of quarter fixed effects), b) by adding country of origin fixed effects and c) by estimating a generalized additive logistic model that allows for a very flexible (cross-validated) time trend.[41] Second, to allow for a more flexible relationship between issue salience and decision making, I recode *Coverage* to include three categories (low, medium, high). Third, to get at potential measurement error, I drop the year 2015 from the analysis altogether, because asylum issue salience was disproportionately high during this year (see Figure 3.1).[42] Finally, as a placebo test, I replace the main independent variable (*Coverage*) with media coverage in the month *after* a decision is reached to show that there is no significant effect of issue salience in the month following the decision (as we would expect).

As Figure 3.2 shows, the estimates of the effect of issue salience based on these robustness tests lend credibility to the main results ('Whole Period' and 'Last Month' in Figure 3.2). All estimates are negative and statistically significant, with the exception of the one from the placebo test ('Month After'), which should not be significant if the effect of asylum issue salience does not occur by chance. Finally, the two used definitions for *Coverage* in the main specifications do indeed provide a lower and an upper bound of the effect.

### 3.5.2 Effect of Asylum Issue Salience by Party

I now turn to the results from the specification that takes into account judges' party affiliations (Equation 3.2). As the coefficients in Columns (3) and (4) in Table 3.1 show, the effect of asylum issue salience on chair judges' average grant rate is largely unrelated to chair judges' party affiliations. All coefficients of the *Party*×*Coverage* interactions—regardless of the definition used for *Coverage*—are substantial, negative and reach conventional levels of statistical significance.

40 Note that for these tests, *Coverage* is measured during the whole decision-making period.

41 See Figure 3.6 in Section 3.A for the latter.

42 See also Figure 3.10 in the Appendix with estimates on the chair judge party level for the model that disregards decisions made in 2015.

**Table 3.1:** Average Marginal Effects: Main Model Regression Results

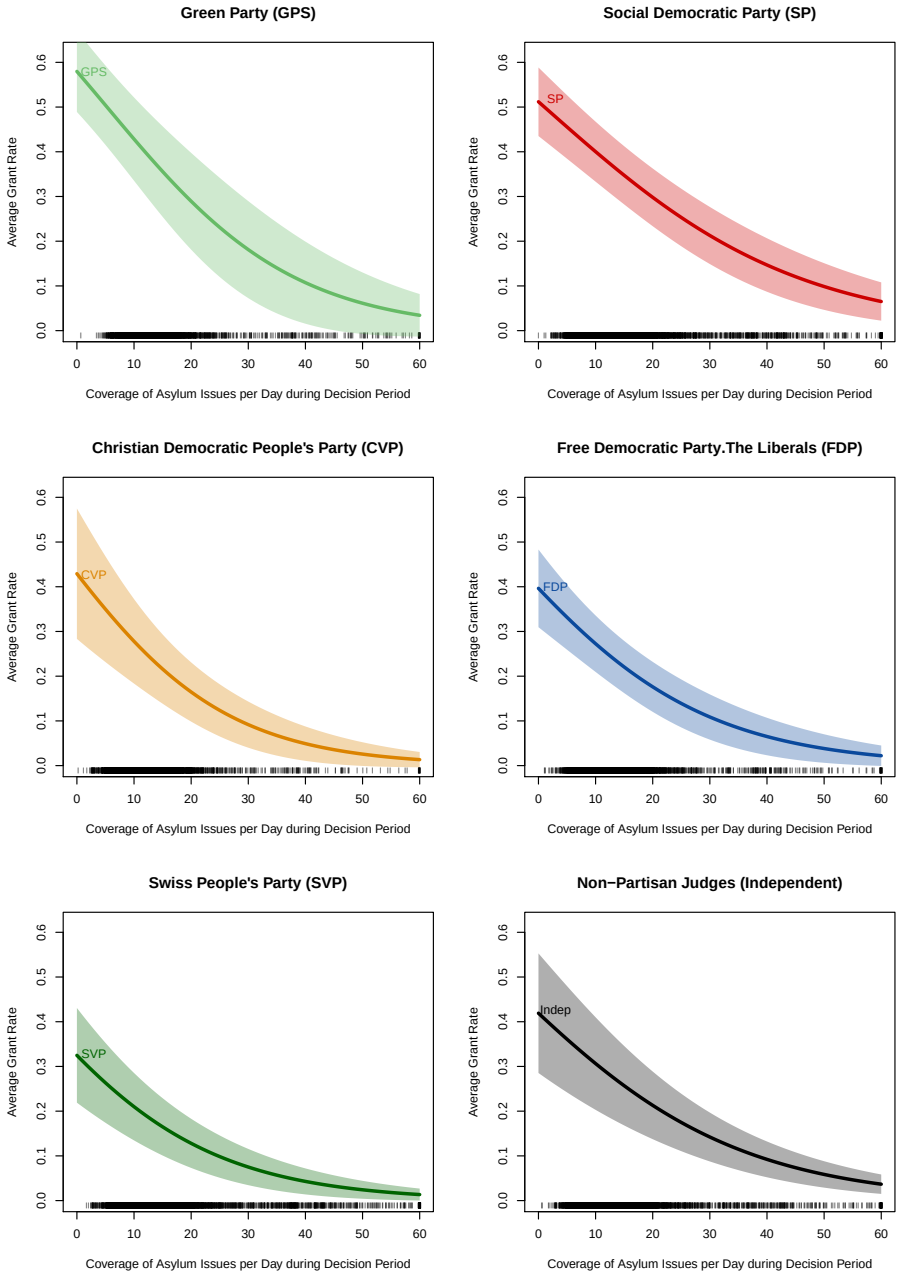
| | *Dependent variable:* | | | |
|---|---|---|---|---|
| | *granted* | | | |
| | *logistic* | | | |
| | Coverage (whole period) | Coverage (last month) | Coverage (whole period) | Coverage (last month) |
| | (1) | (2) | (3) | (4) |
| Coverage | $-0.005^{***}$ | $-0.002^{***}$ | | |
| | (0.001) | (0.001) | | |
| GPS×Coverage | | | $-0.009^{***}$ | $-0.003^{**}$ |
| | | | (0.002) | (0.001) |
| SP×Coverage | | | $-0.006^{***}$ | $-0.001$ |
| | | | (0.001) | (0.001) |
| CVP×Coverage | | | $-0.006^{***}$ | $-0.004^{**}$ |
| | | | (0.001) | (0.002) |
| FDP×Coverage | | | $-0.005^{***}$ | $-0.002^{***}$ |
| | | | (0.001) | (0.001) |
| SVP×Coverage | | | $-0.004^{***}$ | $-0.002^{***}$ |
| | | | (0.001) | (0.001) |
| Indep×Coverage | | | $-0.005^{***}$ | $-0.002^{*}$ |
| | | | (0.001) | (0.001) |
| Judge FEs | ✓ | ✓ | | |
| Party FEs | | | ✓ | ✓ |
| Language FEs | ✓ | ✓ | ✓ | ✓ |
| Quarter FEs | ✓ | ✓ | ✓ | ✓ |
| Observations | 31,937 | 31,937 | 31,937 | 31,937 |

*Note: Coverage* is the average number of circulation-weighted newspaper articles on asylum issues per day during the whole decision-making period in Models (1) and (3) and during the last month before a decision is finalized in Models (2) and (4). The unit of observation is the individual appeal case. Standard errors (in parentheses) are clustered on the chair judge level in all models and all models either include judge or party fixed effects, but not both, since judges have not changed parties. The Green Liberal Party (GLP) is omitted from the table, because this party only has one judge. The cases decided by a chair judge of the Conservative Democratic Party (BDP) were dropped from the analysis entirely since their judge, who joined the court in 2015, has only decided 47 cases. Levels of statistical significance: $^{*}p<0.1$; $^{**}p<0.05$; $^{***}p<0.01$

The only exception is the estimate for the effect of issue salience for judges from the Social Democratic Party, if *Coverage* is defined as the average daily number of articles during the month before a decision was finalized.

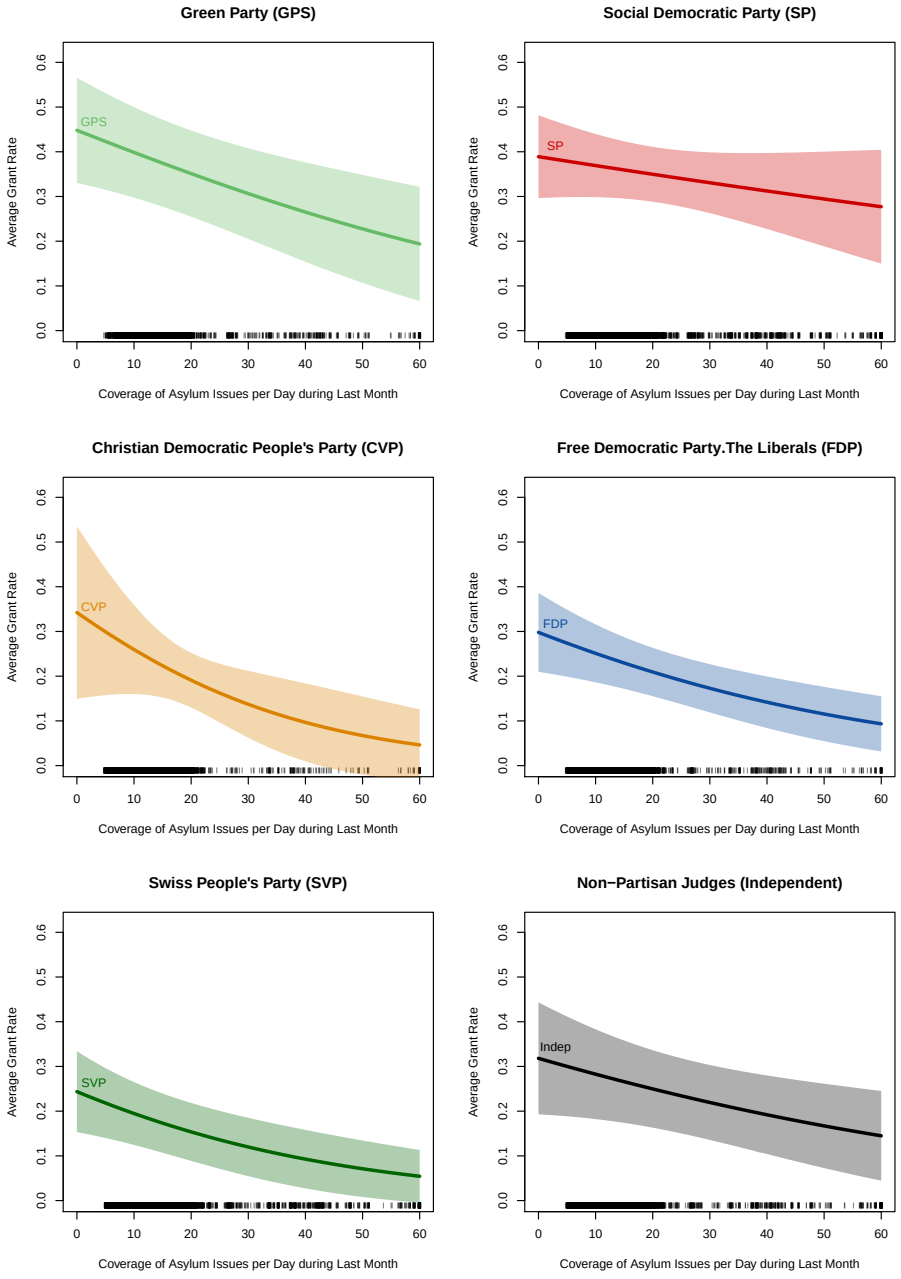
As the similarity of the estimates suggests, parties are not statistically different from one another in their reaction to asylum issue salience, with the exception of SP judges compared to FDP and SVP judges, but again only if *Coverage* is measured during the last month before decision finalization.

**Figure 3.3:** Appeal Grant Rate by Party and Asylum Issue Salience (Whole Period)




*Note*: The graphs show the predicted effect of asylum issue salience on judges' grant rates by party. In each graph, *Quarter* is set to the first quarter of the year 2014 and *Language* to German. The Green Liberal Party (GLP) and the Conservative Democratic Party (BDP) are excluded, because they each only have one asylum judge, who joined the FAC in 2013 and 2015, respectively. The black lines just above the x-axis indicate the distribution of appeals across asylum issue salience, measured as *Coverage* during the month before a decision was finalized. To ensure the results are not dependent on outliers, asylum issue salience is restricted to 60, with the few cases with higher issue salience coded as 60. The shaded areas are 95% confidence bands, based on standard errors that are clustered at the chair judge level.

**Figure 3.4:** Appeal Grant Rate by Party and Asylum Issue Salience (Last Month)




*Note*: The graphs show the predicted effect of asylum issue salience on judges' grant rates by party. In each graph, *Quarter* is set to the first quarter of the year 2014 and *Language* to German. The Green Liberal Party (GLP) and the Conservative Democratic Party (BDP) are excluded, because they each only have one asylum judge, who joined the FAC in 2013 and 2015, respectively. The black lines just above the x-axis indicate the distribution of appeals across asylum issue salience, measured as *Coverage* during the whole decision-making period. To ensure the results are not dependent on outliers, asylum issue salience is restricted to 60, with the few cases with higher issue salience coded as 60. The shaded areas are 95% confidence bands, based on standard errors that are clustered at the chair judge level.

The graphs in Figures 3.3 and 3.4 visually illustrate the estimates for asylum issue salience by party for *Coverage* measured during the whole decision-making period and the last month, respectively. As both figures indicate, while parties' average grant rates correlate in expected ways with parties' asylum policy preferences,[43] the effect of issue salience is not restricted to either the more right-wing (such as the SVP) or the more left-wing (such as the SP) judges. The graphs also visualize the magnitude of the effect of asylum issue salience: with *Quarter* set to the first quarter of 2014, *Language* set to German and *Coverage* measured during whole decision-making period (last month), the appeal grant rate for Christian Democrat (CVP) judges, for example, is predicted to decrease from 26 (25) to 17 (19) percent when moving one standard deviation away from the median media coverage of 11 (12) articles per day to 19 (20).

In sum, the analysis shows that higher issue salience leads to lower grant rates among judges of all parties, including non-partisan judges. The magnitude of the effect depends on the measure used for *Coverage*, but is estimated to be between two and seven percentage points for a one standard deviation increase at median *Coverage*.

## 3.6 Discussion

This section discusses the main findings in two respects. First, it partials out two parts of the effect of asylum issue salience: the part that is related to the number of arriving asylum seekers and the part that is not. Second, it examines in more detail the media coverage content and investigates which particular topics inform the effect of asylum issue salience. Both additional analyses support the interpretation that asylum judges, despite being expert asylum decision makers, "are people, too" (Clark et al. forthcoming), who (subconsciously) become more anti-asylum in times of high asylum issue salience.

43 See Figure 3.9 for an estimation of parties' ideal points on a pro- vs. anti-asylum spectrum estimated based on MPs' votes on asylum issues in the National Council over the study period. Note that the number of judges from the Green Party (GPS) was very small for the first few years of the court's existence and nonexistent for the Green Liberal Party (GLP) and the Conservative Democratic Party (BDP), which is why the latter two parties were excluded from the analysis.

### 3.6.1 Is It about Asylum Applications?

As strongly suggested by Steinmayr (2016) for Austria, media coverage of asylum and refugee issues is correlated with the number of asylum requests lodged. Newspapers write more about asylum seekers when more asylum seekers claim asylum, and, at the same time, more articles might be written even before asylum seekers actually apply for asylum in a given country. In order to estimate which part of the asylum issue effect can be attributed to increasing numbers of asylum applications, I reestimate the main model, including the interaction with the chair judge's party, and control for the average daily number of lodged asylum applications during the whole appeal period and the month before the decision was made, respectively.[44]

Figure 3.5 presents predictions of the part of the effect of asylum issue salience that is unrelated to asylum application numbers by party, with *Coverage* measured during the whole decision-making period. Comparing Figures 3.3 and 3.5 reveals that a significant part of the effect of issue salience—if measured during the whole decision-making period—is driven by its relation to asylum request numbers. The magnitude of the 'overall' effect (irrespective of party affiliation) is reduced to a decrease of one percentage point for a one standard deviation increase of media coverage at the median. Yet, both the part of the effect that is related to asylum application numbers and the part that is unrelated are statistically significant and negative for all parties, except for SP judges. Interestingly, when measuring *Coverage* during the month before a decision is finalized, the issue salience estimates remain essentially unaffected by the inclusion of asylum application numbers during the same period. Indeed, the estimates for the effect of asylum issue salience (without the part driven by asylum applications) when *Coverage* is measured during the whole decision-making period are very similar to those from the specification that measures *Coverage* during the last month, with or without the inclusion of a control for asylum application numbers.[45]

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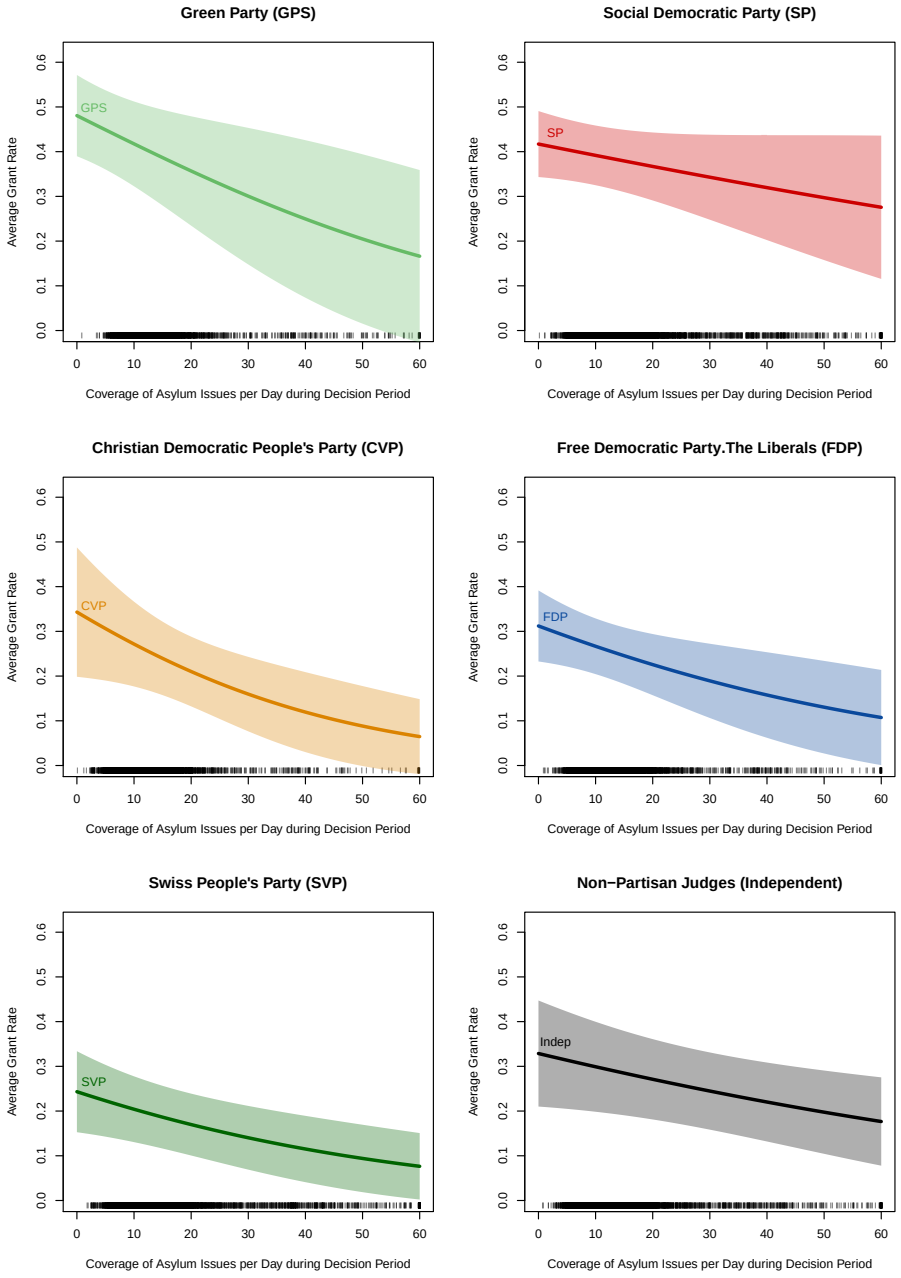
44 The variable for newly lodged asylum claims uses the official monthly asylum statistics published by the Swiss State Secretariat for Migration: https://www.sem.admin.ch/sem/en/home/publiservice/statistik/asylstatistik.html.

45 For a visual illustration of the effect of asylum issue salience that is unrelated to asylum application numbers by party, with *Coverage* measured during the last month, see see Figure 3.10 in the Appendix.

**Figure 3.5:** Appeal Grant Rate and Asylum Issue Salience (Controlling for Number of Asylum Requests, Whole Period)




*Note*: The graphs show the predicted effect of asylum issue salience on judges' grant rates by party, controlling for the average daily number of asylum applications lodged during the decision-making period. In each graph, *Quarter* is set to the first quarter of the year 2014 and *Language* to German. The Green Liberal Party (GLP) and the Conservative Democratic Party (BDP) are excluded, because they each only have one asylum judge, who joined the FAC in 2013 and 2015, respectively. The black lines just above the x-axis indicate the distribution of appeals across asylum issue salience, measured as *Coverage* during the whole decision-making period. To ensure the results are not dependent on outliers, asylum issue salience is restricted to 60, with the few cases with higher issue salience coded as 60. The shaded areas are 95% confidence bands, based on standard errors that are clustered at the chair judge level.

Assuming that the number of asylum applications actually partly drives asylum issue salience, what does that say about why judges become more restrictive? On first sight, the literature offers two different interpretations. On the one hand, this finding is consistent with an account of judges as strategic actors who aspire to reduce their workload (see, e.g., Epstein and Knight 2013). From this perspective, the above analysis suggests that judges take to rejecting more asylum appeals in times of high issue salience because they fear that more applications will result in more appeals. Since rejected appeals are costly for appellants (during the study period, there was a fee of at least 600 CHF ($\sim$ USD 600)), a lower grant rate can be considered a signal to asylum seekers, deterring them from lodging appeals in the first place.

On the other hand, given that the effect is relatively short-term—the *Quarter* fixed effects ensure that only within-quarter variation informs the estimates of issue salience—subconscious rather than conscious (strategic) changes in behavior might provide a better framework for understanding the effect of issue salience. It is in this respect that the literature on how citizens' attitudes toward immigrants are affected by immigration offers valuable insights. As Hopkins's (2010) study on issue salience and immigration attitudes in the U.S. suggests, issue salience carries over and amplifies the negative effect of arriving immigrants on citizens' pro-immigration attitudes. Hopkins's finding therefore calls into question whether the number of asylum requests directly causes the reduction in judges' grant rate. Arguably, it is entirely possible that an increase in application numbers impacts on judges' behavior through an increase in media coverage and attention devoted to the issue.

In sum, whereas an interpretation of judges' reaction to issue salience as a strategic attempt to reduce workload presupposes a conscious behavioral change, underlying attitudinal changes could happen both consciously or subconsciously. While both interpretations find a basis in the literature, the fact that the documented effects are relatively short-lived is arguably more compatible with a subconscious account of the behavioral change. In the absence of an empirical test to distinguish between the two interpretations, the following section explores the topics covered in the newspaper articles and substantiates the latter interpretation.

### 3.6.2 Which Topics Drive the Effect of Issue Salience?

So far, I have used all newspaper articles that mention asylum and/or refugees in any context. This section takes a more in-depth look at the content of the newspaper articles and divides the media coverage corpus into different topics. On this basis, it investigates which particular topics explain the variation in judges' behavior better than others and, by doing so, provides more suggestive evidence that judges' reactions are compatible with a subconscious account of behavioral changes.

I employ a structural topic model (STM) (see, e.g., Roberts et al. 2016) to estimate which topics underlie the newspaper articles. Topic modeling has become a widely used approach to unsupervised topic estimation and works well with unstructured corpora, like the media coverage corpus. There are several topic modeling frameworks, but the STM is particularly suitable for the purpose of this study because it allows for the incorporation of covariates. For a corpus that is based on articles from different newspapers, with different regional foci and over-time variation in the prevalence of topics, covariates that account for the regional focus of a newspaper as well as the time at which an article was published help identify meaningful themes. For example, since some newspapers have a regional rather than national focus, the same topics (e.g., accommodation of asylum seekers) are discussed with differing region-specific content. Similarly, topics vary in their prevalence over time (see Figure 3.8 in the Appendix as an illustration). I estimate 15 topics, thereby allowing for the specific content of a topic to vary across geographical areas and for the prevalence of topics to vary by newspaper and date.[46] Table 3.2 provides an overview of the 15 estimated topics, ordered according to their expected proportions in the corpus.

46 To choose the optimal number of topics is not straightforward, and there is no 'right' choice (Roberts et al. 2014). There are several possible ways to find an appropriate number, but the suggested appropriate number for a corpus that is as large as the asylum articles corpus is in the hundreds. Because the purpose of this approach is to explore which broader themes inform the effect of asylum issue salience, I rely on a small number of topics.

**Table 3.2:** Topic Proportions and Most Important Words

| Topic | Prop | Features |
|---|---|---|
| Accomodation | 0.13 | medel, laaxer, federal_asylum_center, hotel_rustico, municipality, accommodation_container, civil_protection_shelter |
| European Cooperation | 0.11 | frontex, guillotine_clause, easo, mandate_to_negotiate, eu_commission, rescue_mission, schengen |
| Stories | 0.11 | venus_hair_stone, bergier, schischkin, bärfuss, active_service, schleck, lenin |
| Elections | 0.11 | second_seat, guy_parmelin, martullo_blocher, female_voters, rime, voters, center_party |
| Crime | 0.09 | lumengo, snowden, winfrey, bodypacker, chanted, kronospan, riad |
| (Human) Rights | 0.08 | human_rights_echr, suspected_case, marriage_of_convenience, echr, wedding_ban, detention_duration, special_flights |
| Integration | 0.08 | scsw, welfare_recipients, welfare_scsw, social_inspector, social_organization, headscarf_band, gaillard |
| Civic Engagement | 0.08 | beans, dalai_lama, pita, wishing_table, tibetans, jackets, celebration |
| Legislative Politics | 0.07 | mandatory_international_law, abstention, advisory, committee_political_institutions, parliamentary_initiative, time_limit_for_appeal, referendum |
| Asylum Applications | 0.07 | previous_year, previous_month, FOM_director, gattiker, application_numbers, third_quartal, director_mario |
| Culture (Film) | 0.04 | opening_movie, lav, fernand_melgar, special, piazza_grande, puertas, lionel |
| Culture (Exhibitions) | 0.01 | solo_show, artistic, artists, exhibits, gallery_owner, art_museum, museums |
| Culture (Music) | 0.01 | concert, cut, music, jazz, latin, charts, swing |
| Local Activities | 0.01 | steiger, ka, rorschacher, wyler, dumoulin, tsch, weber |
| Church Activities | 0.00 | bishops_conference, catholic_church, theology, parishes, ecumenism, diocese |

There are several topics that directly allude to the political relevance of asylum and refugee issues: Elections, Legislative Politics and European Cooperation have relatively large proportions. Furthermore, topics such as Accommodation, Crime and Integration highlight some of the substantive issues that are debated with regard to asylum seekers and refugees. Although the five least-frequently covered topics (Culture (Film), Culture (Exhibitions), Culture (Music), Local Activities and Church Activities) are reflections of the salience of asylum issues—it is likely that there are more exhibitions that take up asylum and refugee issues in times of high asylum issue salience—they do not cover substantive themes and will therefore be excluded from further analysis.

Beyond providing insights as to which broader themes are covered in the newspaper articles that mention asylum and refugees, I extract the proportion of each topic in each article and use these proportions to reweight *Coverage*. The reweighted versions of *Coverage* will then allow me to explore which topics do a better job of explaining the observed variation in judges' behavior. To do so, I refit the main model as laid out in Equation 3.1 with the topic-weighed versions of *Coverage* separately for the media coverage during the whole decision-making period and the last month before the decision; I then compare the log likelihood of the different models.[47] I thereby focus on the substantively interpretable topics. The model fits for the different versions of *Coverage* are shown in Table 3.3.

The differences between the log likelihoods are relatively small and depend on whether *Coverage* is measured as average daily number of articles during the whole decision-making period or only the month before the decision. However, articles on where and how asylum seekers are accommodated—or will be accommodated—explain more of the variation in judges' behavior than articles pertaining to policy-making processes (Legislative Politics) and human rights questions. At the same time, the overall measures of issue salience do comparatively well at explaining judges' behavior.

What differentiates the topics that appear to play a larger role from the ones that do relatively worse at explaining judges' reactions? While articles pertaining

47 Perhaps unsurprisingly, there is a positive correlation between topics: even though the estimated coefficients for *Coverage* cannot be compared directly due to the weighting procedure, all coefficients with the exception of the ones for (Human) Rights are negative and statistically significant at the 10% level.

**Table 3.3:** Model Fit

| *Coverage* Whole Period | LL | *Coverage* Last Month | LL |
|---|---|---|---|
| Coverage | -10919.28 | Accommodation | -10891.26 |
| German Coverage | -10921.65 | Civic Engagement | -10894.16 |
| Accommodation | -10932.03 | German Coverage | -10897.01 |
| European Cooperation | -10932.62 | Crime | -10897.55 |
| Integration | -10939.12 | Coverage | -10897.65 |
| Asylum Applications | -10953.73 | European Cooperation | -10899.87 |
| Elections | -10953.93 | Asylum Applications | -10901.48 |
| Civic Engagement | -10960.25 | Integration | -10901.65 |
| Legislative Politics | -10965.57 | Elections | -10901.80 |
| Crime | -10970.96 | Legislative Politics | -10902.25 |
| (Human) Rights | -10976.87 | (Human) Rights | -10902.25 |

to topics such as Legislative Politics, Elections and (Human) Rights often do not directly voice citizens' views, articles about the accommodation of asylum seekers frequently feature citizens' concerns. The search for accommodations for asylum seekers has caused very heated debates and local reactions in the past in a number of municipalities across Switzerland.[48] Taking these insights to imply that the most relevant aspect of asylum issues with respect to asylum judges' behavior is the salience of asylum issues among citizens, it is plausible that judges—consciously or subconsciously—react to asylum issue salience in the same way as many of the citizens do: they become more restrictive.

In sum, the additional analyses in this section shed light on what about asylum issue salience leads to changes in judges' behavior. Judges' reactions are, at most, partly driven by asylum applications, and media coverage that features contested issues appears to be more strongly related to judges' reactions than the coverage of other topics, such as asylum and immigration policy-making. Even though this paper cannot determine empirically exactly why judges react to issue salience, the additional analyses provide insights that are at least compatible with an account of judges as experiencing a short-lived, possibly subconscious, hardening of asylum attitudes in times of high issue salience.

48 For example, in Aarburg and Bettwil in 2014, see https://bazonline.ch/schweiz/standard/Der-gespaltene-Kanton/story/19896889.

## 3.7 Conclusion

In recent decades, asylum and refugee issues have frequently been highly salient among both citizens and political elites in many countries across the globe. Particularly in 2015, during the refugee protection crisis, an unprecedented level of media attention was devoted to asylum and refugee issues and, both voters and politicians were concerned about the arrival of asylum seekers (Bansak et al. 2017). Given that research has shown that political elites respond to issue salience (see Epstein and Segal 2000) and that citizens become more anti-immigrant in times of increasing numbers of immigrants, particularly when issue salience is high (Hopkins 2010), the present study addresses the question whether expert decision makers, such as asylum judges at the Swiss FAC, also react to issue salience.

By law, judges are required to decide cases in an independent and impartial manner, treating all appellants equally. In addition, the FAC Judicial Code of Conduct explicitly states that

> Judges shall not allow their judgments to be influenced by pressures exerted by the general public, by litigants or by third parties. They shall also avoid any appearance of being influenced in any way.[49]

While these rules imply that judges should not be affected by the variation in asylum issue salience, past research has also shown that judges are frequently influenced by factors that are beyond the merit of cases. This paper contributes to the literature by showing that when newspapers report more on asylum and refugee issues, asylum appeal judges become more restrictive in their decision making. Comparable cases that are decided in times of high asylum issue salience are more likely to be rejected than those decided in times of low asylum issue salience. These effects are robust across many model specifications and are not restricted to judges affiliated with right or left-wing parties.

Why exactly judges become more restrictive in times of high issue salience cannot be determined empirically in this article. However, the short-lived nature of the effect of issue salience on judges' decisions analyzed here is most compatible with

49 See https://www.bvger.ch/dam/bvger/en/dokumente/2016/05/ethikcharta.pdf.

a subconscious account of judges' behavioral changes. As additional analyses indicate, the effect of asylum issue salience is at most partly driven by increasing asylum applications, and it is the topics that are most salient to citizens (as opposed to political elites), such as the accommodation of asylum seekers, that best explain the variation in judges' behavior.

The effect of issue salience on judges' behavior has to be carefully interpreted in its institutional context. Swiss asylum judges are informally required to be affiliated with (or explicitly support) a political party and at least initially need the support of their party to get elected. Most judgments are publicly available and specify the names of the judges on the panel, but (media) attention toward individual asylum appeal decisions is low. Furthermore, because the FAC is the first and last instance in asylum appeal decision making in Switzerland, reversals are extremely rare. Thus, while the particular institutional and political context certainly facilitates the formation of an effect of issue salience, that is not to say that these findings bear no relevance beyond Switzerland. Asylum issues have been politically salient and divisive in many countries around the world, and judicial selection systems are frequently in some way politicized (see Chapter A 1). It is essential, therefore, that further research explores the relevance of the judicial selection system in the emergence of the effects of issue salience.

These findings are particularly important in times when both the number of arriving asylum seekers and the level of asylum issue salience are high. If, as is implied in the FAC's judicial code of conduct, issue salience should not matter for asylum appeal decision making, there are arguably appeals that are inaccurately rejected simply because they are handled in times of high asylum issue salience. Therefore, beyond revealing a further source of inconsistency in asylum appeal decision making, these findings highlight and problematize the potential power of the media and the public to influence asylum appeal decisions.

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# Appendix

## 3.A Robustness

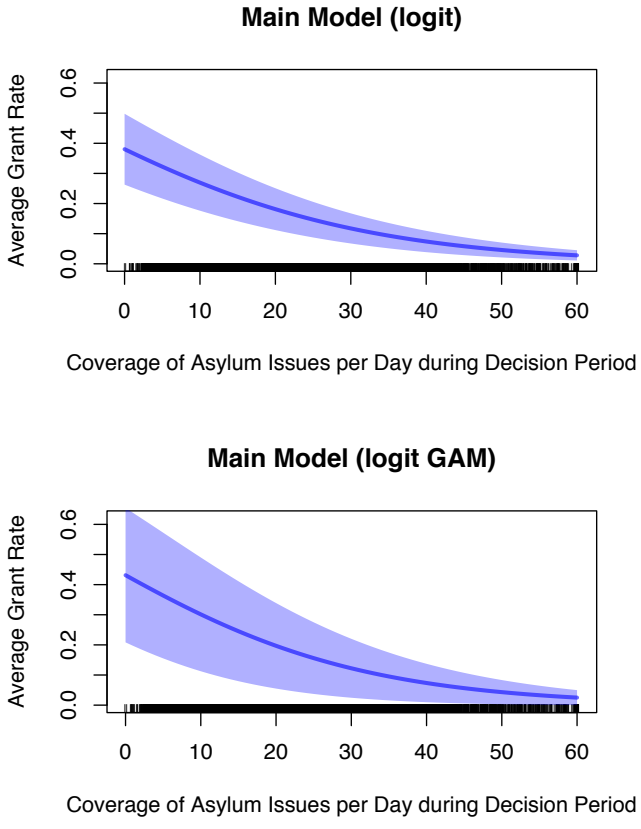
This section provides more information about the robustness tests of the main results, of which the results are displayed in Figures 3.2 and 3.6. First, I fit the main model as outlined in Equation 3.1 with different versions of the main independent variable *Coverage*. I consider the following variations:

- Throughout the paper, I use both the circulation-weighted number of articles on asylum issues per day during the whole decision-making period and during the month before the decision is finalized. I do so because the duration of an asylum appeal is not completely unrelated to the case's merit—the shortest decisions are usually single-judge dismissals. On average, the longer the case duration, the higher the grant rate. Accordingly, only shorter cases with a lower probability of being granted can reach extreme values (both low and high) of issue salience. Therefore, to address the worry that this correlation drives the result, I also perform the main specifications with a version of *Coverage* that only takes into account issue salience during the month before a decision is made. The last month was chosen for two reasons. First, because it is reasonable to assume that the judge worked on the appeal at some point during that time and second, because many cases (the median duration is about 38 days) last less than 30 days. At the same time, it should be noted that taking the last month of issue salience instead of the whole duration might provide a lower bound of the effect, since it is possible that a decision in longer cases has already been reached before the last month.
- To rule out that a few cases handled in times of very high issue salience drive the results, I use a categorical version of *Coverage* instead of the continuous one in the main models. The mean average number of articles published during the decision-making period is 8.1 ('low' salience), 12 ('medium' salience) and 20 ('high' salience).
- In another test aimed at ruling out that only the cases decided in times of

extremely high issue salience are responsible for the documented effect, I disregard all cases decided in the year 2015, a year with disproportionately high asylum issue salience.

- Finally, I perform a placebo test in which I use asylum issue salience during the month after a decision was made as the main independent variable *Coverage*. If the results from the main model are not a spurious correlation, asylum issue salience during the month after should not have an impact on a case's probability of being granted—which is what I find.

**Figure 3.6:** Robustness Tests II




Second, to address the worry that the measure of asylum issue salience also captures other, time-variant changes and not only issue salience, I conduct the following tests. Note that if not explicitly specified otherwise, *Coverage* is mea-

sured during the whole decision-making period, because only this definition of coverage allows for the inclusion of very flexible time trends.

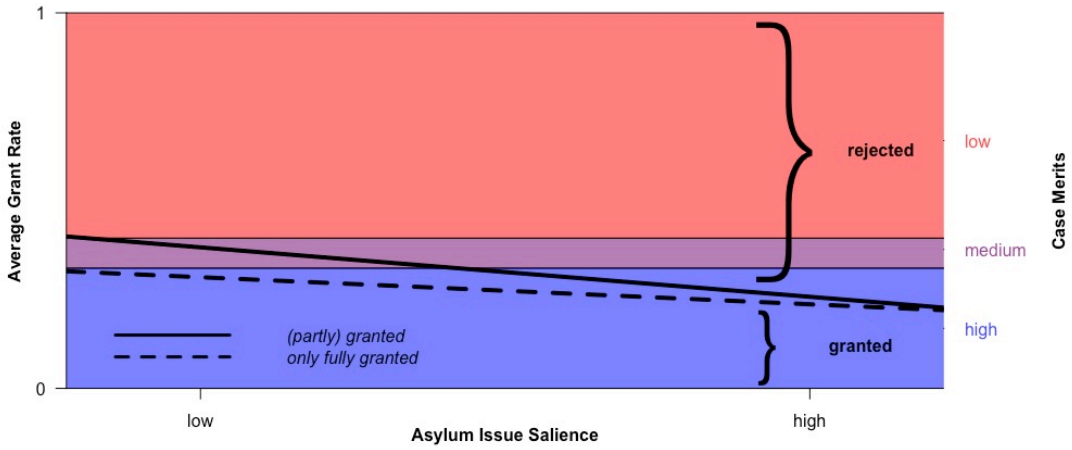
- Instead of employing fixed effects of the quarter-of-year in which the decision was reached, I use month fixed effects. This allows me to account for more variation in the grant rate potentially caused by changes in asylum seekers' countries of origin, first-instance decisions or anything else.
- For the same reason, instead of performing a logit regression, I used a generalized additive logistic model with a very flexible spline for the time trend (UBRE-minimizing k=105) instead of quarter or month fixed effects. The results are very similar to those from the main specification (see Figure 3.6).
- In another test, I include a control for appellants' country of origin to account for the fact that the composition of asylum seekers is not stable.

In addition, since I realize that one might worry that the coefficients shown in Table 3.1 could be misleading (because as Ai and Norton (2003) show that coefficients for interaction terms in logit and probit models are frequently misinterpreted), I not only directly present the average marginal effects in regression tables and plots, but also show that a linear probability instead of a logistic model—an approach frequently advocated for the analysis of judicial decisions (see, for example, Kastellec (2010))—produces very similar results.

Finally, I show that the results also hold up in a plausibility test. One way to test the plausibility of the results is to think through which cases would be decided differently if judges do indeed become more restrictive in times of high asylum issue salience (see Figure 3.7 for an illustration of the following). Conceiving of a judge's preference as a threshold that separates the cases that are strong enough (and will be granted) from the cases that are not strong enough (and will be rejected),[50] higher issue salience leads judges to change the location of their threshold. As a consequence, a case has to be stronger in times of high asylum issue salience in order to be granted than in times of low issue salience. In other words, if judges' preferences change in response to issue salience, we would expect to see that cases just above the threshold in times of low salience are the

50 For a more detailed description of this framework, see Chapter B 1 and Kornhauser (1992) on judges' ideal points and case facts in a one-dimensional case-space.

**Figure 3.7:** Illustration Plausibility Test




*Note*: Assuming that i) the average judge decide cases 'correctly' (i.e., according to their merits) under low issue salience and ii) cases' merits are stable, this graph illustrates what happens when issue salience increases. The black line ('granted') is an illustration of judges' average grant rate if partly granted cases are considered 'granted', while the black dashed line is the grant rate if partly granted cases were considered 'rejected'.

ones that fall below the threshold and are rejected in times of high asylum issue salience.

To indirectly test this notion, I change the coding of the dependent variable 'granted' that underlies $\pi_i$. Whereas in the main model, partly granted appeals are considered granted,[51] Model (2) of Table 3.4 displays results in which I focus on a case's probability of being partly granted. Thus, if judges are indeed exhibiting a change in their preferences, i.e., they apply a 'higher' threshold as to how strong a case has to be to be granted in times of higher asylum issue salience, we would expect that the effect of *coverage* on judges is most pronounced when looking at whether a case is partly granted as opposed to either completely rejected or completely granted. As the results in Column (2) of Table 3.4 corroborate, the probability of a case's being partly granted rather than fully granted or rejected decreases with higher issue salience. Since the probability of a case's being partly granted is very small to begin with—only about 1.8% of all cases in the sample—, a decrease of $-0.2$ percentage points for an increase of one in the measure of issue salience is an 11% reduction. Dropping

51 As illustrated in Section 3.3.2, that is reasonable because appellants win at least in one substantial aspect.

**Table 3.4:** Average Marginal Effects: Focus on Partly Granted Appeals

| | *Dependent variable:* | |
|---|---|---|
| | granted + partly granted | partly granted |
| | *logistic* | |
| | Model (1) | Model (2) |
| Coverage | $-0.005^{***}$ (0.001) | $-0.002^{***}$ (0.000) |
| Judge FEs | ✓ | ✓ |
| Language FEs | ✓ | ✓ |
| Quarter FEs | ✓ | ✓ |
| Observations | 32,385 | 35,839 |

*Note: Coverage* is the average number of circulation-weighted newspaper articles on asylum issues per day during the whole decision-making period. In model (1), partly granted appeals were coded 1, together with fully granted appeals, and rejected appeals were coded as 0. The dependent variable in model (2) is 'partly granted', where partly granted appeals were coded as 1 and both rejected and granted appeals were coded as 0. Standard errors (in parentheses) are clustered on the chair judge level in all models. The cases decided by a chair judge of the Conservative Democratic Party (BDP) were dropped from the analysis entirely since their judge, who joined the court in 2015, has only decided 47 cases. Levels of statistical significance: $^{*}$p<0.1; $^{**}$p<0.05; $^{***}$p<0.01

all cases that were partly granted from the analysis, the estimate for the effect of *Coverage* is reduced to $-0.0037$ (from $-0.0051$).

In sum, I perform a variety of robustness tests and a placebo check, of which the results are displayed in Figures 3.2 and 3.6. As discussed in Section 3.5, they indicate that the findings are robust and support the conclusion that the negative effects of asylum issue salience on a case's probability of being granted is valid.

## 3.B Media Coverage Corpus

This section describes in more detail the corpus that is used to measure asylum issue salience and to perform the structural topic model analysis in Section 3.6. As outlined in Section 3.3, I searched the online data repository Factiva with the string ((‘asylum*’ OR ‘refuge*’) AND ‘Swi(tzerland|ss)’ OR ‘canton’)) in German, French and Italian and downloaded all articles that contained that string

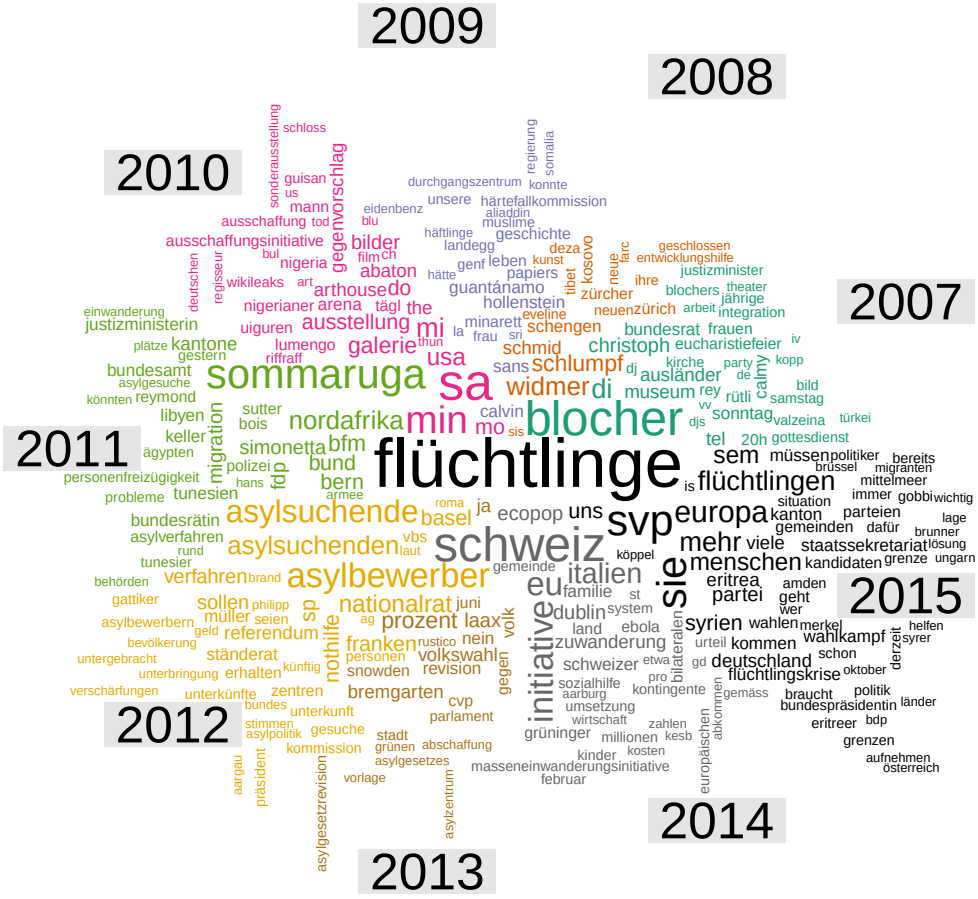
and were published in Swiss newspapers between January 1, 2007 and December 31, 2015.[52] Except for a small number of newspapers from unrelated fields such as finance, I applied essentially no restrictions other than i) the newspapers had to be Swiss and ii) available on Factiva over the whole study period.[53] The final dataset covers eighteen newspapers, of which five are in French and thirteen are in German. Among them are seven of the ten most widely circulated daily newspapers, the three most widely circulated Sunday newspapers and two influential weekly news magazines. Finally, to really focus on articles, I excluded–to the greatest extent possible–lists of events, agendas and reader's letters. Yet, as the estimated topics suggest, I did not succeed completely.

For the topic analysis, I focus entirely on German-language, which reduces the number of articles by about 27%. I also drop articles that were shorter than 100 words. These restrictions leave me with a corpus of just above 25,000 German-language newspaper articles on asylum issues published between January 2007 and December 31, 2015 (see Figure 3.8 for an illustration of the top features in the German-language corpus grouped by year). For the compilation of the document-feature-matrix (dfm), I exclude three sets of words: i) words that frequently occur in published articles ('Keystone', 'Page' and a few more), ii) a list of words that appeared frequently and do not contribute to the understanding of the topics (the names of the newspapers, a number of verbs like 'said', numbers, time-related words like 'year' and single letters) and iii) a shortened version of `quanteda`'s German 'stop words'. Because asylum and refugee issues are frequently connected to discussions about in- and out-groups, I keep words that describe groups of people or interpersonal relationships, such as 'us', 'them', 'everyone' and 'against'. In addition, the thousand most frequent collocations are added as tokens.

52 See, for instance, on http://factiva.com/sources/factivasearch/index_cs.aspx.

53 A complete list of (excluded) newspapers is available upon request.

**Figure 3.8:** Comparison Plot of Frequent Features by Year




*Note*: Comparison plot shows the top features (relative frequency indicated by font size) of the corpus grouped by year.

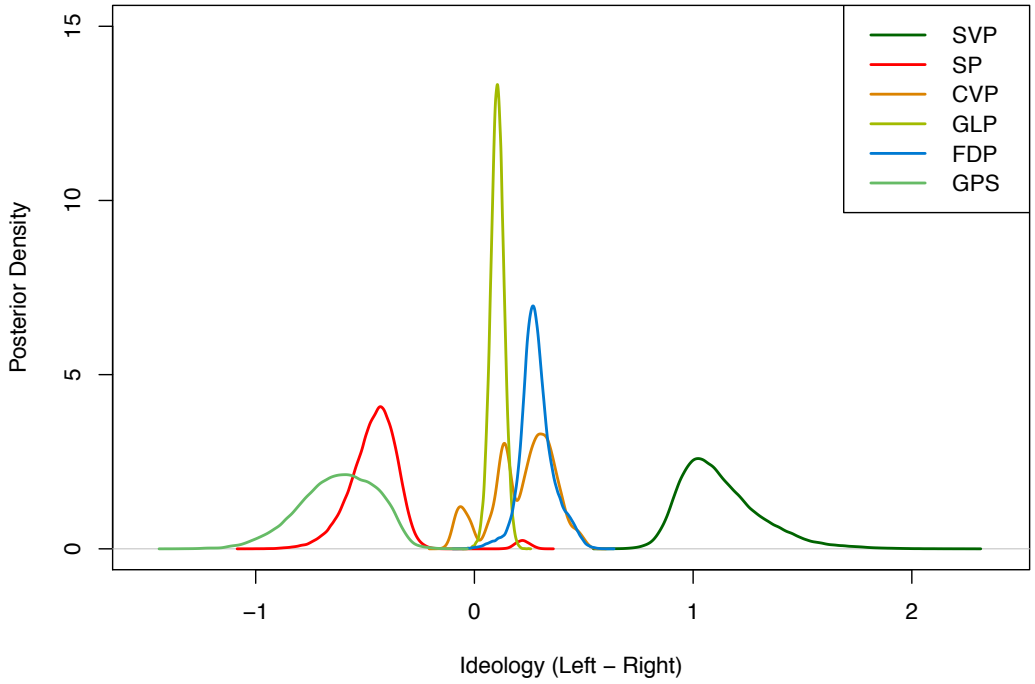
# 3.C Supplementary Tables and Figures

**Table 3.5:** Average Marginal Effects: Regression Results by Gender and Seniority

| | *Dependent variable:* | |
|---|---|---|
| | (partly) granted | (partly) granted |
| | *logistic* | |
| | (1) | (2) |
| Coverage | $-0.005^{***}$ (0.001) | |
| Female × Coverage | | $-0.006^{***}$ (0.001) |
| Male × Coverage | | $-0.005^{***}$ (0.001) |
| High Seniority × Coverage | | $-0.005^{***}$ (0.001) |
| Low Seniority × Coverage | | $-0.006^{***}$ (0.001) |
| Language FEs | ✓ | ✓ |
| Quarter FEs | ✓ | ✓ |
| Observations | 32,385 | 32,839 |

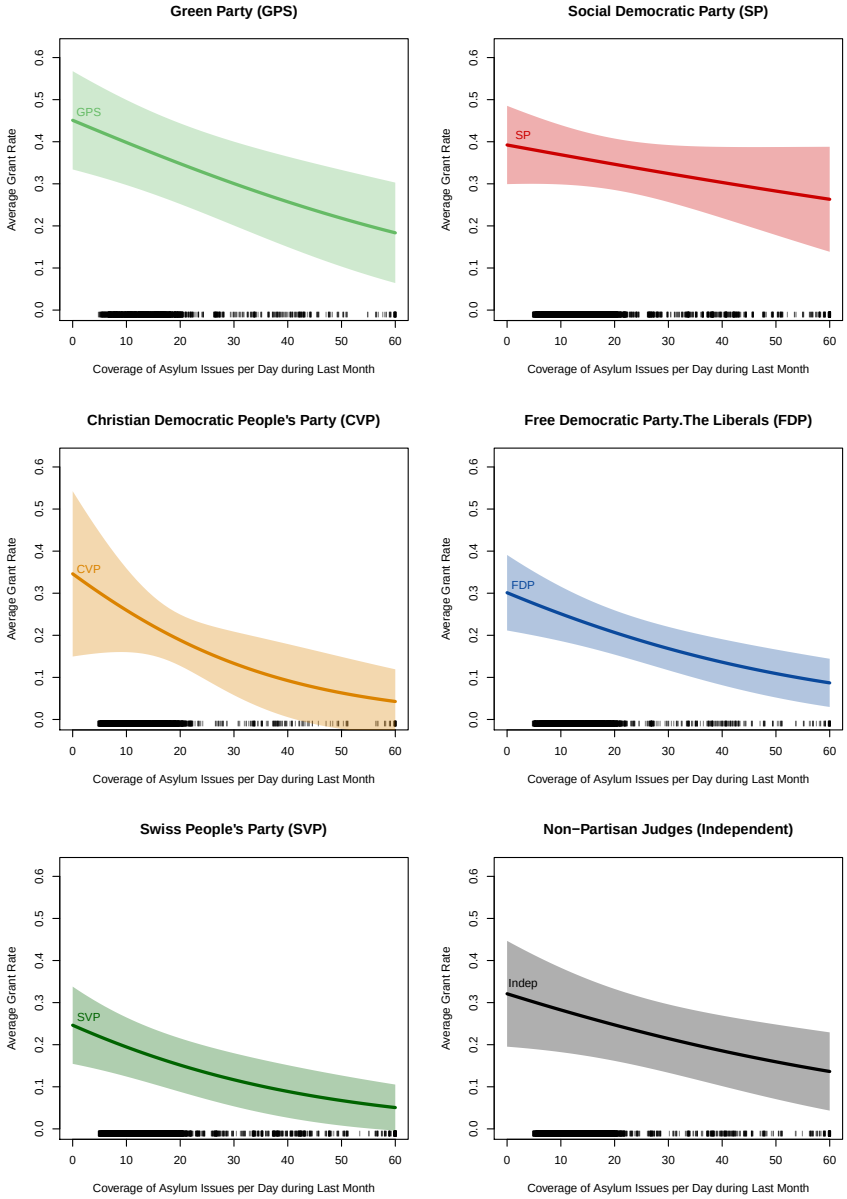
*Note: Coverage* is the average number of circulation-weighted articles on asylum issues per day during the whole decision period. The unit of observation is the individual appeal case; standard errors are clustered on the chair judge level in all models. Levels of statistical significance: $^{*}$p<0.1; $^{**}$p<0.05; $^{***}$p<0.01

**Figure 3.9:** Party Aggregates of MPs' Preferences on Asylum Issues, 2007–2015




*Note*: The graph displays item response theory (IRT) estimates of parties' ideal points on a pro- vs. anti-asylum spectrum estimated based on MPs' votes in the National Council over the study period.

**Figure 3.10:** Appeal Grant Rate and Asylum Issue Salience (Controlling for Number of Asylum Requests, Last Month)




*Note*: The graphs show the predicted effect of asylum issue salience on judges' grant rates by party, controlling for the average daily number of asylum applications lodged during the last month. In each graph, *Quarter* is set to the first quarter of the year 2014 and *Language* to German. The Green Liberal Party (GLP) and the Conservative Democratic Party (BDP) are excluded, because they each only have one asylum judge, who joined the FAC in 2013 and 2015, respectively. The black lines just above the x-axis indicate the distribution of appeals across asylum issue salience, measured as *Coverage* during the month before decision finalization. To ensure the results are not dependent on outliers, asylum issue salience is restricted to 60, with the few cases with higher issue salience coded as 60. The shaded areas are 95% confidence bands, based on standard errors that are clustered at the chair judge level.

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